No. 30

Supreme Court of the United States

OCTOBER TERM, 1941

DANIEL D. GLASSER, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The trial court filed no opinion. The opinion of the Circuit Court of Appeals (R. 1117-1139) is reported in 116 F. (2d) 690.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 13, 1940 (R. 1139-1140). A petition for rehearing was denied on January 23, 1941 (R. 1239). Petition for a writ of certiorari was filed February 28, 1941, and was granted on April 7, 1941 (R. 1245). The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether a defendant may be tried and sentenced as for conspiracy to commit an infamous crime when

1.) The indictment, upon which the trial was had, was not returned by a grand jury in open court;

2.) Women qualified for jury service under State law were excluded from the grand jury;

3.) Half the trial jury was selected by a single private society, and specially coached by the prosecutors before trial;

4.) The indictment itself charged no violation of the laws, and was so indefinite and uncertain as not to inform petitioner of the charge against him;

5.) By the action of the trial court in assigning petitioner's counsel to defend a co-defendant with conflicting interests, petitioner was deprived of effective right to counsel of his own choosing;

6.) The trial court adopted a partisan attitude, admitted highly prejudicial hearsay evidence, indulged in hostile cross-examination of defendant, made flagrantly prejudicial remarks, prevented and confused the examination of witnesses for the defense, assumed the role of prosecutor, and made statements of fact demonstrably erroneous;

7.) The prosecutors removed, deprived petitioner of access to, and lost, exhibits admitted in evidence and essential to petitioner's defense; unlawfully mutilated exhibits by clandestinely writing explanations thereon after their admission in evidence; assumed the role of witness by leading questions and reiteration of asserted facts not otherwise of record; read to the jury only prejudicial parts of ex-

hibits; and surreptitiously submitted to the jury pre-trial statements not admissible in evidence; and

8.) There was no relevant evidence showing petitioner to be a party to the alleged conspiracy or that he was guilty of any other unlawful or improper acts.

STATUTES INVOLVED

The statutes involved are:

U. S. C., Title 18, sec. 88 (Criminal Code, sec. 37).
U. S. C., Title 18, sec. 91 (Criminal Code, sec. 39).
U. S. C., Title 28, sec. 411 (Judicial Code, sec. 275).
U. S. C., Title 28, sec. 412 (Judicial Code, sec. 276).
Illinois Rev. Stats., pp. 1908, 1913.

They appear in the Appendix, p. 80.

STATEMENT

The petitioner, Daniel D. Glasser, was an Assistant United States Attorney for the Northern District of Illinois from March 13, 1935, until June 23, 1939 (R. 186-187). He was in charge of prosecution of all liquor violation cases at Chicago from June, 1935, to April, 1939. In the course of this work, he handled almost one-fourth of all the cases in that office in which there were 18 Assistant United States Attorneys (R. 1038).

Unfortunately, particularly for Glasser, there arose a sharp diversity as to policy between the office of the District Attorney and the local Alcohol Tax Unit. The former, in accordance with the thought of at least one of the district judges (R. 719) and the announced policy of the Department of Justice [1] sought to strike at the roots and convict responsible individuals rather than their agents and other petty violators (R. 895-896, 897). In some instances, this diversity of policy caused the District Attorney's office to make independent investigations on its own behalf. As a re-

[1] Department of Justice Circular No. 2743 to all United States Attorneys, dated August 28, 1935 (Orig. Ex. 199, R 913).

sult, there was constant friction and two-thirds of the agents of the Chicago Alcohol Tax Unit were transferred elsewhere (R. 898-899, 905). Finally, in the trial of a minor bootlegger for transportation, it appeared that information as to major wholesale vendors available to the Alcohol Tax Unit had been by it withheld from the office of the District Attorney (R. 719,898). The Alcohol Tax Unit representatives, called for explanation by Judge Barnes, asserted that an incompetent agent had made a poor investigation report as to the major violators and therefore the report had not been transmitted to the District Attorney. In the course of this explanation, however, it appeared that the agent who had ventured to make this investigation and report had been discharged (R. 720).

Later, the April, 1937, grand jury [2] required the appearance of Yellowley, District Supervisor of the Alcohol Tax Unit (R. 946). After his appearance and before the discharge of the grand jury, Yellowley solicited the foreman thereof to come to his hotel room. This resulted in contempt proceedings against Yellowley, handled by petitioner (R. 1031). The answer of Yellowley admitted the impropriety of his acts and that the conference related solely to the inquiry then being made by the grand jury (R. 1032-1034).[3] It is not denied that, subsequently, Yellowley threatened him with the statement (R. 948):

> Mr. Glasser, I will get you if it is the last thing I ever do.

Thereafter, on December 9, 1938, agents under Yellowley arrested one Paul Svec, who was then appealing from a two-year sentence on a conviction obtained by Glasser. He

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[2] This jury made a report emphatic in its criticism of the policy and conduct of the Alcohol Tax Unit above referred to (R. 789-795). Offer of proof of this report was denied (R. 795).

[3] Offer of proof of this petition and answer was denied (R. 1031-1034).

was taken to their office, there furnished with petitioner's unlisted phone number and told to call petitioner and have him guarantee to the agents payment of money to them (R. 584-585, 932-933). This attempt at entrapment failed and was fully disclosed by the prompt action of Glasser in secreting an agent of the Federal Bureau of Investigation in his office where the agent overheard a conversation with Svec in which the latter confessed and said (R. 565):

> The agents told me they would let me go if I did this telephoning. (See R. 583-585, 932-935).

Svec further stated that he had never before tried to fix his cases (R. 566, 584). This conversation, curiously enough is set forth in the indictment herein as overt Act No. 22 (R. 18).

Shortly after the appointment of a new District Attorney, Glasser, among a number of other assistants, resigned.[4]

On September 29, 1939, an indictment in two counts was filed against petitioner and four others in the District Court for the Northern District of Illinois. The first count was dismissed (R. 100, 715). The second, in substance, alleged that one Kretske, from March 15, 1935, to April 15, 1937, and Glasser, since March 15, 1935, were assistant United States attorneys whose duties included the prosecution of various persons charged with violations of the Federal internal revenue laws, and the presentation to grand juries of facts furnished to them by Alcohol Tax Unit investigators indicating that certain persons were guilty of offenses against such laws (R. 22-27). It charged the peti-

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[4] At this time the District Attorney, W. J. Campbell, paid high tribute to the record of Glasser, saying "Mr. Glasser has the best records of convictions of anyone in this office and his record in alcohol cases is the best in the country. Since I have been in office, he has prosecuted ninety-nine cases and lost only one. He hasn't lost a jury case in three and one-half years." Chicago American, September 29, 1939.

tioner and others with conspiracy to defraud the United States of the conscientious services of an Assistant United States Attorney by promising, offering, causing and procuring to be promised and offered, money and other things of value to an officer of the United States with the intent to influence his decision and action on certain cases which were at times brought before him in his official capacity and with intent to influence such officer to commit and collude in committing certain frauds on the United States, and to induce such officer to do and to omit from doing certain acts in violation of his lawful duty (R. 22, 28).

The petitioner, with the other defendants, filed a motion to quash supported by affidavit, on the ground that the indictment had not been properly returned in open court and was, therefore, void (R. 141, 142, 149) and on the further ground that the grand jury was illegally constituted by reason of the deliberate exclusion of women's names from the jury box from which the names of the grand jurors were drawn (R. 141, 143-149). The motion to quash was denied (R. 42, 151).

On the day of the selection of the jury, in spite of objection by petitioner made personally and by his counsel on the ground that his interests were adverse (R. 180-181), the court appointed the attorney who had been theretofore retained by petitioner and was representing him alone, to act also as counsel for the defendant Kretske (R. 183).

The underlying theory of the Government's case is very vague (R. 154-155, 160). As stated by the District Attorney, it was that "there was a conspiracy on foot to solicit certain persons to make promises" (R. 154).

The proof by the Government attempted merely to show that money for the purported corruption of petitioner or others (third persons) had been paid by accused persons to certain of petitioner's co-defendants upon promises by such co-defendants that their cases would be "fixed". In addi-

tion, the Government showed merely that as to some of these accused persons the United States Commissioner discharged, or the grand jury voted no bills. However, neither the United States Commissioner nor any grand juror—nor, indeed, any other person—testified to any unfaithful conduct on the part of the petitioner. The utter lack of evidence of wrongdoing by petitioner is pointed out below.

Nevertheless, all of the defendants were found guilty. Petitioner filed a motion for new trial and in arrest of judgment (R. 1046) supported by an uncontradicted affidavit to the effect that by reason of total and systematic exclusion of persons otherwise qualified, he did not have a trial by jury free from bias, prejudice and prior instruction (R. 1049-1051). This motion was denied and exceptions were noted (R. 103). Petitioner was sentenced to confinement in the penitentiary for fourteen months (R. 1068).

The Circuit Court of Appeals affirmed (R. 1139-1140).

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In holding that the record shows that the indictment was returned into open court by a grand jury.

2. In failing to hold that the jury commissioner and the clerk of the district court violated the laws of the State of Illinois and of the United States with reference to the selection of the grand jury.

3. In holding that the trial court did not abuse its discretion in denying petitioner's motion for new trial based on an uncontradicted affidavit affirmatively showing and offering to prove illegal and prejudicial composition of the trial jury.

4. In failing to hold that the indictment was insufficient in law because it is vague, indefinite, and fails to charge a

violation of law which may properly be made the basis of a conspiracy count against such an officer.

5. In failing to hold that the appointment by the trial court of petitioner's counsel to act as counsel as well for a co-defendant having conflicting interests substantially impaired the constitutional rights of the petitioner to have effective assistance of counsel and to due process of law.

6. In holding that the acts and conduct of the trial judge and the misconduct of the prosecuting attorney, permitted and condoned by the trial judge, did not deprive the petitioner of the benefit of the presumption of innocence and the right to a fair trial.

7. In failing to hold that there was no evidence in the record to support the judgment and that therefore reversal of the judgment was required.

SUMMARY OF ARGUMENT.

1) ***No return of indictment by grand jury.***—There was no indictment returned against petitioner by any grand jury in open court or otherwise. The recognized rule requires "that the record must show that the indictment was returned into court by the grand jury either by a minute entry to that effect or by indorsement of the fact upon the indictment itself, and that an omission will be fatal." Here, the defect, after it had been pointed out by petitioner, was sought to be cured by an "addition" to the motion slip respecting the discharge of the grand jury—which "addition" merely stated that "the Grand Jury return 4 indictments in open court" without specifying against whom they were returned and without stating who made the "addition" or upon what authority. But the law is settled that such a correction can be made, or omission supplied, only by formal order of the court, *nunc pro tunc*, in the proceedings for which the parties would have a right to notice and to participate; and

no such proceedings have here been held or even attempted. The matter is fundamental, since it is the basis upon which all subsequent proceedings are had and is an essential in order to assure compliance with the express requirement of the Fifth Amendment. Here there is not merely a failure to satisfy the fundamental law, but an *ex parte* and clandestine attempt to alter the record as well.

2) ***Women excluded from grand jury.***—The jury commissioner and the clerk of the district court violated the laws of the State of Illinois and of the United States with reference to the selection of the grand jury, by arbitrarily excluding women therefrom. The Federal statute requires that jurors in the courts of the United States shall have the same qualifications as jurors of the highest court of law of the State at the time when they are summoned for service (28 U. S. C., sec. 411). Consequently, a Federal grand jury, drawn from a list of grand jurors from which women were excluded contrary to the requirements of Ill. Rev. Stats., 1939, c. 78, secs. 1, 25, could not lawfully return the indictment upon which the present proceeding is founded.

3) ***Half of trial jury "packed".***—At least half of the trial jurors were illegally and prejudicially selected. Trial jurors are required to be selected by the clerk of court and a jury commissioner (Judicial Code, sec. 276, 28 U. S. C., sec. 412). After trial, petitioner discovered that all women whose names were placed in the jury box from which the petit jury venire was drawn had been presented to the clerk of the court by the Illinois League of Women Voters and had been prepared by that League from its membership. Six of these women served on the jury in petitioner's trial. The motion for new trial, accompanied by the affidavit of petitioner, clearly required a new trial since the selection of half of those serving on the jury had been made by persons having no authority to select them. These jurors were, more-

over, selected not merely by and from a private society, but were further restricted to those members who "had attended jury classes whose lecturers presented the views of the prosecution." Not merely was the jury unlawfully constituted, but the illegality involved no mere technicality or irregularity.

4) ***Vague and insufficient indictment.***—The indictment is void for uncertainty, and it charges no crime under the Federal laws. It fails to inform petitioner "of the nature and cause of the accusation" against him (Const., Art. VI) or to sufficiently define the charge so as to enable him subsequently to avail himself, upon a further prosecution for the same cause, of his right to immunity from double jeopardy (Const., Art. V). Moreover, the indictment, if it alleges a crime at all, charges a "conspiracy" to commit the substantive offense of bribery of petitioner; but since that substantive offense itself necessarily involves a concert of action and a plurality of agents, there is no place for a charge of conspiracy, and such a charge is wholly without authority of law.

5) ***Deprivation of right to counsel.***—Petitioner, by the action of the trial court and through no fault of his own, was deprived of the effective assistance of counsel specifically guaranteed by the Sixth Amendment. After petitioner had selected and secured counsel, the trial court, arbitrarily and over the objection of both counsel and the petitioner, appointed petitioner's counsel to act as counsel for another defendant in the same trial whose interests were adverse to those of petitioner. The prejudicial effects of this action are clearly shown upon the record.

6) ***Misconduct of trial judge.***—The conduct of the trial judge deprived the petitioner of the presumption of innocence and of a fair trial. He erroneously admitted highly

prejudicial hearsay reports of Alcohol Tax Unit agents which purported to summarize testimony which witnesses would give if summoned before a grand jury. His hostile cross-examination and frequent prejudicial remarks constituted a departure from the required attitude of impartiality and deprived the petitioner of the benefit of much evidence offered on his behalf. He undertook to state facts supposedly known to him personally, but not shown by the evidence and in part erroneous. His repeated acts of advocacy far exceeded his right to examine witnesses for purposes of clarification of the record. His hostile questions, in at least one case based entirely on facts assumed and without foundation in the record, clearly impaired the credibility of petitioner's witnesses with the jury, nullified the testimony of witnesses for petitioner, and misrepresented to the jury the measure of petitioner's duties at the arraignment of accused persons.

7) ***Misconduct of prosecutor.***—The improper conduct of the prosecuting attorney clearly violated the right of petitioner to a fair and impartial trial. In breach of a specific rule of court, the prosecuting attorneys took physical possession of, and refused petitioner access to, exhibits introduced in evidence and important to petitioner's defense. The prosecutor illegally removed from the office of the clerk, and lost, exhibits constituting part of the record essential to the defense. An assistant prosecutor unlawfully mutilated exhibits, by writing explanations thereon after the trial had ended. And the prosecutor by his leading questions frequently assumed the role of witness, misled the jury by reading only part of the testimony of a witness before a grand jury, was allowed to assume in his questions the existence of wholly unproved but highly damaging facts, and surreptitiously submitted to the jury pre-trial statements not admissible in evidence.

8) ***Utter lack of evidence.***—The evidence in the record fails utterly to show that petitioner was a party to, or had knowledge of, any conspiracy or other unlawful design. There was no evidence of any kind, either direct or indirect, that petitioner ever received a bribe or solicited any. Indeed, the prosecutor stated that "there isn't anything in this indictment that says that anybody paid Glasser a bribe." The proof offered by the Government merely shows the solicitation and payment of money, *wholly by, from, and to third parties,* with hints and innuendoes that it was to be used for the corruption of petitioner. No shred of evidence indicates participation by petitioner. At most, some of his co-defendants are shown to have traded upon their assumed or asserted ability to influence petitioner. There is not even a showing that, in any specific case, petitioner was in any respect remiss in his duty as a prosecutor. The record wholly fails to sustain the conviction.

ARGUMENT

I.

THE RECORD FAILS TO DISCLOSE THAT THERE WAS AN INDICTMENT RETURNED AGAINST THIS PETITIONER BY ANY GRAND JURY IN OPEN COURT OR OTHERWISE

The petitioner, with the other defendants, filed a motion to quash the indictment because, among other things, "the said indictment was not properly returned in open court" (R. 142). The affidavit in support alleged that the records of the clerk of the court fail to show that the indictment was returned in open court (R. 149). The court denied the motion to quash (R. 42, 151).

1. ***The record is required to show that the grand jury, and not the foreman alone, returned the indictment into court.*** On appeal, the Circuit Court of Appeals acknowledged that (R. 1119):

> it must be made to appear from the record that the grand jury appeared in open court and returned into

> court the indictment to which the defendant is required to plead.

In *Ledbetter* v. *United States*, 108 Fed. 52, 55 (C. C. A. 5), the court stated the rule as follows:

> It seems to be well settled that the record must show that the indictment was returned into court by the grand jury either by a minute entry to that effect or by indorsement of the fact upon the indictment itself, and that an omission will be fatal. See authorities cited in volume 10, Am. & Eng. Enc. Law, pp. 410, 411. It may be noticed that a defective record may be cured by proper entry ordered by the court during the term, or, if not called to the attention of the court during the term, then by proper order entered nunc pro tunc at a subsequent term.

This rule is universally recognized. *Renigar* v. *United States*, 172 Fed. 646 (C. C. A. 4) and authorities cited; *Angle* v. *United States*, 172 Fed. 658; *Rainey* v. *The People*, 8 Ill. (3 Gil.) 71, 72; *Yundt* v. *The People*, 65 Ill. 372, 373; *Commonwealth* v. *Cawood*, 2 Va. Cas. 527, 541; see *State* v. *Squire*, 10 N. H. 558, 559; 1 Chitty, Criminal Law (5th ed.), pp. 324, 720; Edwards, The Grand Jury, p. 154; Proffatt, Trial by Jury, sec. 59, p. 92; Radcliffe and Cross, The English Legal System, pp. 191-2, 330-1; Stephen, History of Criminal Law of England, p. 274; 2 Story on the Constitution (5th ed.), sec. 1784, pp. 563-564; Thompson & Merriam, Juries (1882), sec. 696, p. 734.[5] The Circuit

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[5] Cf. Code of Criminal Procedure, American Law Institute, Official Draft (1931) sec. 147. The commentary to this section, pp. 526-528, includes an incomplete list of state statutes (See *e. g.*, 2 Minn. Stat. (Mason 1927) sec. 10638; 1 Mississippi Code (1930) c. 21, sec. 1198) which recognize the constitutional right to a return by the grand jury by specifically requiring that the return be presented by the foreman to the court in the presence of the grand jury. These statutes, of course, are but declaratory of the common law practice. *Green* v. *State*, 19 Ark. 178, 185; *Cachute* v. *State*, 50 Miss. 165, 170.

Court of Appeals held, however, that the record satisfied this requirement.

The only basis upon which the court could have so held that there was a return of indictment against petitioner was a surreptitious, anonymous, and unauthorized entry—which may not properly be deemed part of the record—in the form of an entry on a motion slip made during the October term subsequent to the initialling of the slip by the court on the occasion of the discharge of the September grand jury (R. 39).[6] Petitioner, by an examination of the record and the clerk's papers first ascertained that there was nothing to show a return by a grand jury of an indictment against him. At the time of his examination the motion slip initialed by the court, "JHW" (James H. Wilkerson), contained a single entry: "Order discharging Grand Jury of Sept. Term 1939." At the argument on the motion on November 7, 1939, the motion or minute slip above referred to was produced by the clerk at the defendants' request.[7] It was then discovered to bear the added entry: "The Grand Jury return 4 Indictments in open Court. *Added 10/30/39.*" (Emphasis ours.) (R. 39.)

This entry was without notice to petitioner, without an authorizing order of court, and without initials to identify by whom or by whose authority it was made. Aside from the fact that this entry identifies none of the indictments returned, it is not without significance that the date of this entry is the last day on which the petitioner's notice of

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[6] A photolithograph copy of this slip appears at page 23 of petitioner's reply brief on petition for certiorari. The certified original has been filed with the Clerk of this Court.

[7] The minute slip, of course, was a mere recording of the activities of the September grand jury constituting no part of the record in any particular case (cf. *Green* v. *State*, 19 Ark. 178, 183). Although it might well be that it would ordinarily have been included in the transcript, it is plain from the endorsement "Df. Ex. 1 11/7/39" that it was here included by virtue of the petitioner's introduction of it at the argument.

motion and motion to quash could have been served on the United States Attorney.[8]

2. ***The unauthorized entry is without effect since a nunc pro tunc order was required.***—This entry of October 30, 1939, was not made during the term of court at which the clerk's endorsement purports to show that an indictment was filed, Sept. 29, 1939. A new term of court had commenced on the first Monday of the month, October 2, 1939. Judicial Code, sec. 79, 28 U. S. C. sec. 152.

Since it purports to relate what happened at a prior term, this entry was fatally defective because unauthorized by a *nunc pro tunc* order of the court. Without such an order the addition, whether by the clerk or by any other person, was entirely lacking in significance.[9] The requirement, as stated in 1 Bishop, Criminal Procedure, sec. 1160, is approved by this Court in *Wight, Petitioner*, 134 U. S. 136, 143-144:

> When the term of the court has closed, it is too late to undo, at a subsequent term, what was done at a former term. A judgment of the court, for instance, cannot then be opened, and modified or set aside. Neither, it has been held, can the clerk, at a subsequent term, make an entry of what truly transpired at the preceding term. But this refers to the power of the *clerk*, proceeding of his own motion. The *court* may order *nunc pro tunc* entries, as they are called, made to supply some omission in the entry of what was done at the preceding term; yet this is a power the extent of which is limited, and not easily defined.

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[8] Petitioner's motion to quash was filed October 31, 1939 (R. 40); but, under Rule 46 of the district court, the motion was required to be served on the United States Attorney not later than 4:00 P. M. of the prior day, October 30.

[9] This must be particularly true where as here, it appears that during the October Term at which the amending entry was made, a different judge, Judge Sullivan, and not Judge Wilkerson, entered all orders in the case (R. 39, 40).

The object of the rule appears from its first enunciation (Britton, Ancient Pleas of the Crown) as quoted by this Court in the *Wight* case, *supra*, p. 144). As paraphrased in 3 Bl. Comm., p. 409, the declaration in effect provided:

> that a record surreptitiously or erroneously made up, to stifle or pervert the truth, should not be a sanction for error; and that a record, originally made up according to the truth of the case, should not afterwards by any private rasure or amendment be altered to any sinister purpose.

Protection of the verity and sanctity of the records (Cf. *Bilansky* v. *State*, 3 Minn. 427, 430) thus required that the entry to show return of the indictment by the grand jury at a prior term be made only upon order of the court. The motion to quash did not merely aver the omission of the proper entry of presentation by the grand jury but denied that it was in fact returned (Cf. *Johnson* v. *State*, 24 Fla. 162). Because it was the foundation of all subsequent proceedings and essential to his protection against being forced to defend against charges never acted upon or presented by a grand jury and because it involved no mere correction of an entry recording what had admittedly taken place, but was entirely new, as to a fact denied, this error involves no mere technicality or formality. *Rainey* v. *People*, 8 Ill. (3 Gil.) 71, 72; *Gardner* v. *People*, 20 Ill. 430, 432-433 (1858). The ordinary safeguards were applicable. The United States as moving party for correction had the burden of proof; the petitioner had the usual rights of being present, of inspection of any memoranda offered as a basis for the correction, the right of cross-examination and the right to offer proof. *Downey* v. *United States*, 67 App. D. C. 192, 91 F. (2d) 223, 230, 231, 233; *Hogan* v. *Hill*, 9 Fed. Supp. 333, 335; *Green* v. *State*, 19 Ark. 178, 189; *Felker* v. *State*, 54 Ark. 489, 491-492. Because made without an order, therefore, this entry has no more effect than

if it had never been made. *Bowen* v. *State*, 81 Ga. 482, 483, 8 S. E. 736.

The added entry has no probative value.—Even if the absence of a *nunc pro tunc* order be disregarded, the mere statement: "The Grand Jury return 4 Indictments in open Court" obviously has no tendency to show that indictment was ever returned against petitioner. Since the indictments there referred to are identified neither by name, number, or otherwise, the clerk may not be said to have certified that this indictment was one of them, and there is nothing in the record by which it could be identified as such. Plainly, a minute entry such as this, whether it recites the return of 52 bills, as in the *Ledbetter* case, or of only 4 bills as here, is meaningless so far as petitioner is concerned. *Ledbetter* v. *United States*, 108 Fed. 52 (C. C. A. 4); *Cornwell* v. *State*, 53 Miss. 385, 389; *Bodkin* v. *State*, 20 Ind. 281, 282.

3. ***The entries properly made afford no basis for a presumption that return was made by the grand jury.***—There is no room for presuming return of an indictment on the basis of a filing endorsement such as that appearing in this indictment (cf. *Mose* v. *United States*, 35 Ala. 421). Presumptions, of course, should not be indulged against a person accused of crime. *Laura* v. *Mississippi*, 26 Miss. 174, 176; cf. *Crain* v. *United States*, 162 U. S. 625, 645. In any event, however, no such presumption may be applied here. In the first place, the larger part of the endorsement by the clerk was but a printed form, the written part (indicated by italics) consisting only of the date and signature, as follows: "Filed in open court this *29* day of *September*, A. D. 19*39*. *Hoyt King*, Clerk."[10] More important, however, is

[10] Because the Circuit Court of Appeals (R. 1119) and the Government (Br. in Opp., p. 11) both assert that the endorsement is "in the clerk's own handwriting," there has been filed with the clerk for the information of this court a duly certified photostatic copy of the back of the indictment bearing this endorsement.

the fact that the placita of the clerk shows only that "(it being the twenty-ninth day of September the indictment was filed)" (R. 1); and further, despite the inclusion in petitioner's Praecipe for Record of a request for "Return of indictment and order to file same * * *" (R. 132), the clerk's caption states merely that the indictment "was filed in the clerk's office of said court" (R. 2). The clerk's caption thus contradicts his endorsement on the indictment. For one says "Filed in open court" and the other says "filed in the clerk's office". Since this leaves the record equally consistent with the non-existence of the fact of filing in court as with the existence of such fact, there is left no basis upon which to found the presumption of return by the grand jury. *United States* v. *Ross,* 92 U. S. 281. Certainly, in the light of the record showing of serious breach of official duty by the same clerk's office (see *infra,* pp. 55-56), it would be sheerest casuistry to idulge the presumption here.

No considerations of secrecy prevent conformity to the established practice.—It has at various times been suggested that the common law requirement has been dispensed with as valueless in protecting the rights of the accused. This obsolescence is asserted to have resulted from the discontinuance of the practice of announcing the name and describing the purport of the indictment, necessitated in prevention of escape from the jurisdiction between such announcement and the arrest. But this amounts to saying that a safeguard integral in the constitutional guaranty may be dispensed with by reason of the conveniences of law enforcement. Aside from this inherent fallacy, the argument is answered by the fact that numerous States by statute not only specifically require that the indictment be returned in open court but as well provide that the fact of indictment shall not be by any officer divulged until the accused has been arrested or bailed. (See e. g.,

N. Y. Criminal Code, Book 66 (McKinney's Cons. Laws), sec. 272; Mich. Stats. Anno., Sec. 28, 965; see Code of Criminal Procedure American Law Institute, Official Draft (1931), sec. 189, commentary, pp. 597-598, listing other State statutes.) The suggested difficulty, more apparent than real, is in such jurisdictions obviated either by (1) allowing the clerk to endorse the fact of return on the indictment, entering the indictment on the public record only after apprehension of the accused, or (2) by identifying the indictment by letters or numbers in the record entry. *State* v. *Knowlton*, 115 Maine 544; *State* v. *Sloan*, 309 Mo. 498, 507-508.

Thus the protection of having the grand jury present when the indictments are delivered into court may be substantially preserved without increasing the difficulties of enforcement.

Conclusion.—The requirement that an indictment be returned in open court is essential to the attainment of the underlying purpose of the requirement of the Fifth Amendment that indictment be by a grand jury—protection of the citizen against unfounded accusation, whether it be prompted by government officers or by partisan passion or private enmity, or be the result of mistake. *Ex parte Bain*, 121 U. S. 1, 11; *Charge to Grand Jury*, Fed. Cas. No. 18,255, at p. 993; *Gardner* v. *People*, 20 Ill. 430, 432. The Arkansas court stated the basic considerations favoring continued observance of this rule as follows (*Green* v. *State*, 19 Ark. 178, 189):

> In our country, where there is no political or religious persecution to interfere with the impartial administration of the criminal law, an adherence to technical rules may, in some cases, seem to produce inconvenience, rather than subserve the substantial purposes of justice. But we know not what storms and revolutions the future may produce, and the time may

> come, even in our own country, when the wisdom of adhering to these long established rules will be manifest.

In the case now before this Court, there has been not merely a failure to satisfy the requirements of law; but an *ex parte* and clandestine attempt to alter the record as well. The judgment must, therefore, be reversed.

II

THE JURY COMMISSIONER AND THE CLERK OF THE DISTRICT COURT VIOLATED THE LAWS OF THE STATE OF ILLINOIS AND OF THE UNITED STATES WITH REFERENCE TO THE SELECTION OF THE GRAND JURY BY ARBITRARILY EXCLUDING THE NAMES OF WOMEN FROM THE BOX FROM WHICH THE LIST OF GRAND JURORS WAS DRAWN

Petitioner, with the other defendants, based his motion to quash upon the ground that the grand jury was composed exclusively of men, and that women, although they constitute a substantial part of the population of the Northern District of Illinois and of the registered voters of that District, were excluded from the box from which the list of grand jurors were drawn, in violation of the Federal statute (R. 141). The affidavit in support showed that the list of sixty names drawn for the purpose of selecting the grand jury were all male persons and the members of the grand jury as finally impanelled were all persons of the male sex (R. 143-144). The United States Attorney filed a motion to strike (R. 150). After hearing argument, the court denied the motion (R. 42, 151).

The motion was based on the requirement of R. S., sec. 800, 28 U. S. C. sec. 411:

> Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications * * * and be entitled to the same exemptions, as jurors of the highest court of law in such state may

> have and be entitled to at the time when such jurors for service in the courts of the United States are summoned.

Under Illinois law, at the time when these grand jurors were summoned, the Illinois statutes specified the qualifications of jurors of the highest court of law of the State as being "the legal voters (or electors) of each sex." Ill. Rev. Stats., 1939, c. 78, sec. 1, as amended by Senate Bill No. 88, and sec. 25, as amended by Senate Bill No. 89, both effective July 1, 1939 (Ill. Const. Art. IV, sec. 12).[11]

In the court below the government conceded that under Section 25 jury commissioners were required to place women on jury lists on and after July 1, 1939. But it argued that in counties of less than 250,000 the county boards had the right to wait until at least September 1, 1939.

Accepting this contention, the Circuit Court of Appeals said (R. 1118):

> Under the Act in question the county boards of 17 of these counties were privileged to wait until September 1, 1939, before including women on the jury lists.

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[11] Ill. Rev. Stats., 1939, c. 78:

Sec. 1. [Applicable to counties not having commissioners. See sec. 2] The county board of each county shall, at or before the time of its meeting, in September, in each year, or at any time thereafter, when necessary for the purpose of this Act, make a list of sufficient number, not less than one-tenth of the legal voters of each sex of each town or precinct of the county, giving the place of residence of each name on the list, to be known as the jury list.

* * * * * * *

Sec. 25. [Applicable to counties of over 250,000 population, having jury commissioners] * * * The said commissioners upon entering upon the duties of their office, and every four years thereafter, shall prepare a list of all electors of each sex between the ages of 21 and 65 years, possessing the necessary legal qualifications for jury duty, to be known as the jury list.

The government in the brief in opposition to petition for certiorari says:

> The clerk and the jury commissioners were, however, commanded by U. S. C. Title 28, sec. 411, to place upon jury lists only those who were at the time they were summoned eligible for jury service in the highest court of law in the State for which jurors were selected. Section 1 of Chapter 78, although effective on July 1st, prior to the summoning of the grand jury in the instant case, does not purport to make women immediately eligible for such service, but only when their names were placed on the jury list by the county boards, and the boards were privileged to defer their action until their September meeting.

This argument is fallacious in its confusion of statutory "qualification" with ministerial "selection" or "eligibility". So doing, it proves too much. If the argument means anything, eligibility of a woman for Federal jury service is to be tested by the question whether her name has been placed on a list by a county board.

If, as the government argues, the non-performance by the State bodies of their functions in carrying out the State law is to limit the action and measure the duty of the Federal court jury commissioners under the Federal statute, then there would appear to be no rational reason why the Federal jury commissioners could not have postponed compliance with the law until women had in fact been empanelled on a State court grand jury.

It is, of course, absurd to read into "qualifications" as used in 28 U. S. C. sec. 411, the requirement that persons otherwise qualified under the State statute must also have actually been listed on the State court jury list. It is obvious from the wording of the Illinois statute that it contemplated the possibility that, because of exhaustion of the old, a new list might be required before the September meeting

of the county commissioners and that in such event, i. e., whenever after July 1, 1939, the process of selection of grand jurors should be begun, females should not be excluded because of their sex.

This complete disregard of the statute, resulting in exclusion from the grand jury list of approximately one-half of those otherwise qualified for service, is obviously no mere irregularity.

III

THE TRIAL JURY WAS PACKED BY THE ILLEGAL DELEGATION OF THEIR DUTIES BY THE CLERK AND THE JURY COMMISSIONER IN VIOLATION OF THE PETITIONER'S RIGHT TO AN IMPARTIAL TRIAL

By statute, the trial jurors were required to have the same qualifications as jurors of the highest court of the State. Judicial Code, Sec. 275, 28 U. S. C. Sec. 411 (Appendix, p. 80). At least 300 names are required to be placed in the jury box from which a venire is drawn; and those names are required to be selected by the clerk and a jury commissioner. Judicial Code, Sec. 276, 28 U. S. C. Sec. 412 (Appendix, p. 81); *United States* v. *Murphy*, 224 Fed. 554, 562

In support of his motion for a new trial Glasser filed an affidavit (R. 1046, 1049-1051) [12] stating that *all* of the names of females placed in the jury box from which the petit jury in this cause was drawn were "presented to the clerk of the court • • • who is one of the jury commissioners, by the Illinois League of Women Voters, which list had previously been prepared by said league of women voters from their membership" (R. 1050). The motion was denied (R. 103,

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[12] The motion was entered March 8, 1940 (R. 101), continued to April 8 (R. 101) and to April 22 (R. 102). The court heard "arguments of counsel" on April 22, 1940 and continued the case for disposition to April 23, 1940 (R. 102, 1046). On April 23, 1940, Glasser filed his affidavit in support of his motion for new trial (R. 1046, 1049-1051).

1059). On appeal, the Circuit Court of Appeals held (R. 1139):

> In the instant case the trial court in passing upon the motion for a new trial did consider the affidavits filed and was convinced that the appellants were in no wise prejudiced by the incidents complained of. Under such circumstances we cannot say that the District Court had abused the discretion vested in it by law.

The Circuit Court of Appeals erred in approving this manifest violation of Federal statute. Upon the showing here of a clear violation of the statute enacted to ensure the fundamental right to a jury representing a fair cross-section of the community, denial of a new trial was a plain abuse of discretion. Cf. *Langnes* v. *Green*, 282 U. S. 531, 541; *Burns* v. *United States*, 287 U. S. 216, 222-223.

The affidavit clearly shows that approximately one-half the names placed in the jury box (*i. e.*, the names of all females placed therein) were selected not by the clerk or jury commissioner as required by Federal statute, but by a private, unauthorized person or group. The selection involved a systematic exclusion of all except a restricted class in a single social-study organization and deprived petitioner of his right to a fair trial.

This fundamental flaw in the manner of selection of the petit jury is shown by the affidavit to have been presented at the earliest moment at which the facts became known to petitioner (R. 1050-1051), by motions for new trial and in arrest of judgment (R. 1046). Cf. *Albizu* v. *United States*, 88 F. (2d) 138, 141; *Ogden* v. *United States*, 112 Fed. 523, 524, 526; *Hyman* v. *Eames*, 41 Fed. 676, 678; *Wilson* v. *Clement*, 126 Fed. 808, 810. The affidavit offers to prove the allegations therein contained (R. 1051). Since the allegations were in no way controverted either by counter-affidavits or even by a formal denial of the grounds assigned, they were to be accepted as true for the purpose of the

motion. *Neal* v. *Delaware*, 103 U. S. 370, 395-396; *Ogden* v. *United States, supra*, 526-527; cf. *United States* v. *Chaires*, 40 Fed. 820, 823. The statement in the bill of exceptions and in the order of the court that "arguments of counsel" were heard clearly negatives the presentation of any evidence by the government (R. 1046, 102).

The affidavit states that, of the 100-person venire, 47 were female and 53 were male. This indicates that the clerk conformed to the requirement under Illinois law that the names of males and females be placed in the jury box without regard to sex. Ill. Rev. Stat. (1939), c. 78, Sec. 1 (Appendix, p. 87); *People ex rel. Denny* v. *Traeger*, 372 Ill. 11, 18. Since it is shown that the names of all females were presented by the Illinois League of Women Voters and since it appears that one-half the jury were women (R. 1244), it follows that, as to approximately one-half of the names placed in the jury box, from which the six women jurors were drawn, selection was made not by the clerk or the jury commissioner but by a single unauthorized private organization.

The trial court was without power, as a matter of discretion or otherwise, to dispense with the statutory requirement that selection be exclusively by the clerk and the jury commissioner, since it is an essential feature of the system prescribed by law and designed to secure and preserve the right to a fair and impartial trial. *Dunn* v. *United States*, 238 Fed. 508, 512 (C. C. A. 5); *United States* v. *Murphy*, 224 Fed. 554, 560, 561, 566 (N. D. N. Y.); *In re Petition for Special Grand Jury*, 50 F. (2d) 973 (M. D. Pa.); *Klemmer* v. *Railroad*, 163 Pa. 521, 530; *State* v. *Newhouse*, 29 La. Ann. 824, 825; *State* v. *Jenkins*, 32 Kan. 477, 479.

The error here is not a mere irregularity as to manner of selection. Cf. *Agnew* v. *United States*, 165 U. S. 36, 42-45; *United States* v. *Brookman*, 1 F. (2d) 528, 536-538 (D. Minn.), aff'd 8 F. (2d) 803 (C. C. A. 8); *Wilson* v. *United*

States, 104 F. (2d) 81, 82 (C. C. A. 5). Neither does it involve a mere solicitation by the clerk of information from varied sources preliminary to selection by the clerk in an effort to obtain what are sometimes known as "blue-ribbon" juries. Cf. *Walker* v. *United States*, 93 F. (2d) 383, cert. denied 303 U. S. 644; *United States* v. *McClure*, 4 F. Supp. 668, 671.

The error here arises from the fact that the jury has been selected by persons having no authority whatever to select them. As a result, the whole proceeding to form the panel is void and, therefore, the objection may be taken at any time. See *United States* v. *Gale*, 109 U. S. 65, 69; *Rodriguez* v. *United States*, 198 U. S. 156, 164.

Even were the delegation of authority by the clerk to be deemed but a defect or imperfection in matter of form within the meaning of R. S., Sec. 1025, 18 U. S. C. Sec. 556, cf. *Williams* v. *United States*, 275 Fed. 129, 132 (C. C. A. 9), the affidavit in support of petitioner's motion obviates operation of that section. For it not only concludes that there was resultant prejudice but affirmatively states the facts showing bias, *i. e.*, that all the women whose names were presented "had attended jury classes whose lecturers presented the views of the prosecution" (R. 1050-1051). Indeed, it would seem that prejudice is necessarily implied by the showing that the jury was packed in that approximately half of the jury list names were selected, not by the clerk or jury commissioners, but by a private organization. "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith* v. *Texas*, 311 U. S. 128, 130.

It seems equally plain that the action of the clerk in effectuating a systematic exclusion from the jury list of all females save members of the jury classes of the Illinois League of Women Voters constituted an administration of

the law so arbitrary as to violate the petitioner's right to due process under the Fifth Amendment.

It should not be necessary to argue, before this Court, that selection of privately-picked, specially coached, or politically associated jurors is a gross impairment of the civil right to trial by jury.

IV

INDICTMENT

THE ALLEGED INDICTMENT IS FATALLY DEFECTIVE IN FAILING TO INFORM PETITIONER OF THE CHARGE AGAINST HIM AND IN CHARGING A CONSPIRACY TO COMMIT A SUBSTANTIVE OFFENSE WHICH ITSELF REQUIRED CONCERT OF ACTION AND PLURALITY OF AGENTS

By demurrer, petitioner asserted in the trial court that the indictment was so vague and indefinite as to fail to inform him of the charge against him, making it insufficient in law (R. 48-50). This was overruled (R. 60).

The first count was dismissed upon motion of the United States Attorney (R. 100). Of the second count, the pertinent portions of the charging part, paragraph 14, alleged (R. 28):

> that the defendants * * * well knowing the premises aforesaid, in the City of Chicago, in the State and District aforesaid, and at other places to the said grand jurors unknown, heretofore, on, to wit, March 15, 1935, and thereafter continuously up to the date of the return of this indictment, in violation of the provisions of Section 88, Title 18, of the United States Code of Laws, did wilfully, unlawfully, and feloniously conspire, combine, confederate, and agree together, and with each other, and with divers other persons to the grand jurors unknown, to defraud the United States of and concerning its governmental function to be honestly, faithfully and dutifully represented in the courts of the United States by a United States Attorney or an Assistant United States Attorney to prose-

cute certain delinquents for crimes and offenses cognizable under the authority of the United States as the same should be presented and determined according to law and justice, free from corruption, improper influence, dishonesty or fraud, more particularly its right to a conscientious, faithful and honest representation of its interests in certain suits, controversies, proceedings, matters, actions, and causes brought and pending in the United States Courts in the Northern District of Illinois; that is to say, by promising, offering, causing and procuring to be promised and offered, money and other things of value to an officer of the United States, and to persons acting for and on behalf of the United States in an official function, under and by authority of a department and office of the Government of the United States, with intent to influence his decision and action on certain questions, matters, causes, and proceedings which were at times pending, and which were by law brought before such officer or officers in his or their official capacity, and with the intent to influence such officer or officers to commit and aid in committing, and to collude in committing certain frauds on the United States, and to induce such officer or officers to do and to omit from doing certain acts in violation of his or their lawful duty.

Casual reading of this charge shows that the first part, preceding the videlicet, aside from charging the offense in the general words of 18 U. S. C. sec. 88, does little more than allege in the abstract that the United States was to be defrauded by its governmental function to be represented in court by a United States Attorney or an Assistant United States Attorney to prosecute delinquents for violation of law free from corruption, improper influence, dishonesty or fraud in certain suits and proceedings brought and pending in the United States courts in the Northern District of Illinois.

There can be but little doubt that this part of the indictment is so vague as to be inadequate to inform petitioner

of the charge against him. Particularly, it was insufficient to enable the petitioner to enjoy his right subsequently to avail himself of the right against double jeopardy in case of a further prosecution for the same cause. *United States* v. *Cruikshank*, 92 U. S. 542.

It fails utterly to state what, if any, definite agreement was made and stated only in the vaguest of terms the purpose of some undetailed agreement. It leaves entirely open the question as to identity of the Assistant United States Attorney to whom reference is made, fails to describe the class of delinquents it was the duty of such officer to prosecute, or the crimes involved. In purporting to particularize, this indictment merely states a broad class of facts without allegation of the primary and individualizing facts.

Since it states no facts which might properly be regarded as describing or defining the offense itself, this portion of the charge, if standing alone, would be fatally defective. *Larkin* v. *United States*, 107 Fed. 697, 701. *Asgill* v. *United States*, 60 F. (2d) 780, 783-785. As was held by this Court in *United States* v. *Hess*, 124 U. S. 483, 487.

> Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.

For this reason, the Government must, therefore, rely on the second part of this paragraph following the words "that is to say" in order to maintain that the indictment sufficiently charges a crime at all.

While ordinarily allegations need not be proved as laid under a videlicet, *Brady* v. *United States*, 41 F. (2d) 449, 450, where, as here, such allegations are material averments of the indictment, they must be taken as positive averments to be proved as laid (Joyce on Indictments (2d

ed.), sec. 307, p. 314; *Dakins* case, 2 Wm. Saund. 290, 291, 85 E. Rep. R. 1077; cf. *Anderson* v. *United States*, 30 F. (2d) 485; *Kutler* v. *United States*, 79 F. (2d) 440, 443; *Naftzger* v. *United States*, 200 Fed. 494, 497) and constituting an essential part of the charge. *Browne* v. *United States*, 145 Fed. 1, 5 (C. C. A. 2). This is confirmed by the fact that the Circuit Court of Appeals in stating what it deemed to be the substance of the charge stresses particularly the videlicet or second part of this charging paragraph (R. 1119-1120). However, even if the allegations of the videlicet may be invoked in an effort to cure the vagueness of the indictment, it is nevertheless subject to the same criticism; and the indictment is void.

Moreover, the language of the videlicet alleges an offense against the United States, not in the words of the conspiracy section but almost word for word, in the language of R. S., Sec. 5451, 18 U. S. C., Sec. 91:

> *Bribery of United States Officer.* Whoever shall promise, offer, or give, or cause or procure to be promised, offered, or given, any money or other thing of value * * * to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof * * * with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, * * * or with intent to influence him to commit or aid in committing, or to collude in, * * * the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made, or tendered, and imprisoned not more than three years.

This is corroborated by the statement of the prosecutor draftsman (R. 154):

> This indictment follows very closely the language of Section 91.

The facts alleged and not the statute cited by the pleader determine the legal force of the averments. *Williams* v. *United States*, 168 U. S. 382, 389; *Outlaw* v. *United States*, 81 F. (2d) 805, 806.

It thus appears that the indictment charges a conspiracy to commit a substantive offense which, insofar as it involved petitioner, would require concerted action by two or more parties. Concert of action with at least one other party would be necessary to establish the substantive offense by petitioner. Since if he, an officer, with the necessary intent to influence his own decision and "to collude in committing certain frauds on the United States," were to procure another to promise, offer or give any money to him, it would necessarily contemplate active participation on his part as well as on the part of the other person.

Since concert of action and the plurality of agents would have been necessary to commission of the substantive offense by petitioner which is in the indictment charged to have been the objective of the conspiracy, the indictment is void. *United States* v. *Sager*, 49 F. (2d) 725, 727 (C. C. A. 2); *United States* v. *Dietrich*, 126 Fed. 664, 667 (C. C. Neb.) per Van Devanter, J.; *United States* v. *New York Cent. & H. R. R. Co.*, 146 Fed. 298, 303 (C. C. N. Y.); *United States* v. *Hagan*, 27 Fed. Supp. 814 (W. D. Ky.); cf. *Gebardi* v. *United States*, 287 U. S. 112, 121-122.

V

PETITIONER, BY ACTION OF THE TRIAL COURT AND THROUGH NO FAULT OF HIS OWN, WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS

The record shows that, as a result of the action of the court in appointing his counsel to act as counsel for another co-defendant, petitioner was deprived of the full and effective assistance counsel would otherwise have afforded him. The Government does not deny that the constitutional guarantee of the assistance of counsel includes the right of accused to have counsel unembarrassed by representation at the same trial of others whose interests are adverse and

conflicting. By reason of the theory of the prosecution and nature of the proof, the Government does not and cannot deny the resulting conflict in interests between the two defendants, Kretske and Glasser, during the course of this trial. Indeed, the Circuit Court of Appeals impliedly recognized the existence of the right and its violation in this case, erring only in holding that the appointment of Glasser's attorney to act for Kretske was not "such an error as to warrant reversal" (R. 1131).

This deprivation by the trial court prevented petitioner from adequately safeguarding his right to exclude incompetent evidence and from fully exercising his right to cross-examine the witnesses for the prosecution. The error was highly prejudicial and required reversal.

Some time before his trial, Glasser had retained as his attorney William Scott Stewart. On the day set for trial, Harrington, whose appearance had been earlier entered on November 2, 1939, as counsel for Kretske (R. 41), filed a motion for continuance (R. 173). This motion was denied and another attorney, McDonnell, was appointed for Kretske (R. 96). The following day McDonnell requested, and the court ordered, that his appointment be vacated (R. 179, 97). Thereupon, the court asked whether there was any reason why petitioner's attorney could not represent Kretske (R. 180). Mr. Stewart immediately stated that there was inconsistency in the defense of petitioner and Kretske, making specific reference to the affidavit earlier filed in support of petitioner's motion for severance in which those inconsistencies had been pointed out (R. 180, 171). He said (R. 180):

> There will be conversations here where Mr. Glasser wasn't present, where people have seen Mr. Kretske and they have talked about, that they gave money to take care of Glasser, that is not binding on Mr. Glasser, and there is a divergency there, and Mr. Glasser feels

> that if I would represent Mr. Kretske the jury would get an idea that they are together, and all the evidence——

Petitioner further emphatically voiced the same objection in person, stating that he wished to have exclusive representation by his lawyer (R. 181). Despite these objections, the court appointed Stewart to represent Kretske as well (R. 97, 183). Having set out the objections, Stewart could do no more, and he accepted this appointment upon insistence of the court (R. 180, 181, 183), and thereafter represented petitioner and his co-defendant, Kretske, throughout the trial.

The only evidence presented against petitioner which even purported to show wrongdoing on his part (legally inadmissible but allowed to go to the jury without objection) consisted of testimony by third persons as to conversations with alleged co-conspirators in the course of which they agreed to pay, or did pay money to Kretske or others for the alleged purpose of obtaining favorable consideration from petitioner—in which conversations Kretske was alleged to have said that the money, or part of it, would be paid over to petitioner. That the Government's evidence against Glasser would be so limited was indicated by the phraseology of the alleged indictment. (Kretske, of course, denied participation in any of these conversations (R. 799).) As against Kretske, of course, this testimony (regardless of weight) was competent and not subject to objection. As against petitioner, however, its incompetency is apparent unless and until connection of the petitioner with a conspiracy was shown. No such connection was ever shown. Nevertheless, no objection on behalf of petitioner was made to the testimony by Stewart. His reason for refraining from objection necessarily must have been a desire to protect Kretske. Had objection been made on behalf of petitioner alone and not of Kretske, the jury would have been led to believe that Kretske was admitting

the truth of the testimony; on the other hand, the same type of limited objections might have prejudiced petitioner upon inference by the jury that petitioner, who was not present at the conversation, was contesting their verity. The absence of any objection necessarily led the jury to regard the evidence against Kretske as being of equal materiality and weight against petitioner.

The following examples clearly establish the highly prejudicial consequences to Glasser which necessarily followed from designation of his counsel to act also for Kretske:

William Brantman testified that he paid $3,000 to Kretske on behalf of one Abosketes (R. 652). Brantman testified that he did not know petitioner (R. 656). Plainly, the interests of petitioner dictated a cross-examination by which to emphasize that in this transaction there was no mention or other basis for inference that petitioner was in any way connected with it. Faced with this dilemma resulting from the conflicting interests of his two clients, the attorney Stewart requested and was allowed a postponement of cross-examination (R. 663). After considering the matter for three days, Brantman then being recalled, Stewart declined to cross-examine—apparently having determined to avoid probable prejudice to Kretske (R. 711).[13] The damaging effect of the failure to cross-examine this witness is sustained by the comment of the court itself before sentence (R. 1061-1062). It will not do to say that because in direct examination it had appeared that Brantman did not know Glasser, there was no necessity for cross-examination. Glasser had the right to emphasize as strongly as possible by cross-examination the complete absence of reference to his name in these negotiations. The prejudice to Glasser because of its omission was, moreover, emphasized

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[13] "A lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." Canon of Professional Ethics No. 6.

by the reiterated testimony by the judge as to his own knowledge of the law-breaking character of Abosketes, as will later appear in Point VI.

Under leading questions, a bootlegger purported to narrate statements of Kretske implicating Glasser. While Stewart objected to the leading character of the questioning, he forewent the obvious objection that this testimony was inadmissible against Glasser (R. 244-245).

Another witness for the Government, one Hodorowicz, was, without objection by Stewart, permitted to state that, at the time he paid $800 to Kretske, the latter said that "he had to deliver the money to Red" (Red being the name purportedly used for Glasser) (R. 297).

The same witness testified that, in another conversation with Kretske, the latter said: "They got Glasser over a barrel, he can't do anything. He has to put you in jail." Although plainly prejudicial to and inadmissible as against Glasser, Stewart made no objection (R. 301).

Testimony by the same witness as to conversations of the same tenor with Kretske in connection with another case was received without objection by Stewart (R. 306).

Another witness, Edward Dewes, a confessed bootlegger, was allowed to testify that when he delivered $100 to Kretske to obtain a no bill in the accusation against him of liquor law violation, the latter stated that "he would send it over to the 'red-head'," purporting to refer to Glasser (R. 542-543).

Another still operator, Stanley Wasielewski, without objection by Stewart, was permitted to testify that he heard Kretske say to another: "I will take care of everything between me and the red-head" (R. 631).

To precisely measure the degree of prejudice suffered by the petitioner is impossible. To do so in determining the correctness of the decision below would be to beg the constitutional question. This Court has long recognized

that the fundamental rules of fairness guaranteed by the Constitution with regard to procedure in the course of judicial inquiry, including criminal trials, may not be disregarded by reason of the degree of prejudice which may be shown in a particular case, or even by reason of the correctness of the result in the individual case. *Tumey* v. *Ohio*, 273 U. S. 510, 535; *Patton* v. *United States*, 281 U. S. 276, 292. The same principle is more fully stated by Mr. Justice Roberts in his dissent in *Snyder* v. *Massachusetts*, 291 U. S. 97, 136-137, where, while there was disagreement as to the existence of the asserted constitutional right, there was no division as to the principle here invoked.

But in any event, when regard is had to the liberal rules of evidence which so largely favor the prosecution in conspiracy cases, the action of the trial court in forcing petitioner to forego the benefit of undivided assistance of counsel, unhampered by regard for the interests of other defendants, plainly left him with little or none of the substance of the right to effective assistance of counsel intended to be safeguarded by the Sixth Amendment. As a consequence, the court in this case lost jurisdiction and the judgment of conviction is void. *Powell* v. *Alabama*, 287 U. S. 45, 59, 67, 68; *Johnson* v. *Zerbst*, 304 U. S. 458, 467-468. Wherever asserted, the fundamental right to assistance of counsel has been held to include the right to such assistance untrammelled and unimpaired by the representation of conflicting or adverse interests. *People* v. *Bopp*, 279 Ill. 184, 191-192; *People* v. *Rose*, 348 Ill. 214, 218; see *People* v. *Rocco*, 209 Cal. 68, 73. Indeed, the necessity for protection of this fundamental right in cases such as this has been recognized by the Solicitor General of the United States. In his motion (p. 6) to dismiss in this Court in *Anderson* v. *Treat*, 172 U. S. 24, he said:

> It is unnecessary for me to emphasize the propriety of Judge Hughes' action in insisting that Anderson,

upon an issue of life or death, should have his own counsel of standing and ability, not embarrassed by employment of any others concerned in the transactions • • •.

Obviously, petitioner has here been denied a fundamental right.

VI

THE CONDUCT OF THE TRIAL COURT OPERATED TO DEPRIVE PETITIONER OF A FAIR TRIAL AND OF THE PRESUMPTION OF INNOCENCE

It is well recognized that the right conduct of the trial judge is essential to preservation of the accused's right to a fair trial. In this case, the record is replete with instances of misconduct on the part of the trial judge, so grossly prejudicial to the rights of the petitioner as to make a new trial imperative in order to preserve even the form of a fair trial. A few of these instances should suffice here.

1. ***He erroneously admitted highly prejudicial hearsay evidence.***—The court plainly violated the elementary rule against admission of hearsay in admitting in evidence over objection Exhibits 81A (R. 529) and 113 (R. 532). The rule against hearsay evidence has always been applied with particular rigor in criminal cases as an essential part of the right to confront and cross-examine witnesses. *Hopt* v. *Utah*, 110 U. S. 574, 581; *Donnelly* v. *United States*, 228 U. S. 243, 273. These were reports by Alcohol Tax Unit agents of their investigations of the so-called *Western Avenue Still* case and of the *Spring Grove Still* case, respectively.

Glasser had presented the *Spring Grove* case to three different grand juries, August 1937, October 1937, and May 1938 (R. 528), obtaining indictments against five out of eight individuals on the last occasion (R. 528-529). The *Western Avenue* case was presented only once with a resultant no-bill (R. 528).

Seeking to impute wrong-doing to Glasser in his failure to obtain indictments in the latter case and against the three remaining defendants in the former case, the government sought to show what the Alcohol Tax Unit had learned from their investigation by attempting to have an investigator testify as to his conclusions from the investigation, rather than as to facts of his investigation, and to testify from hearsay as to facts deemed to show violation (R. 445). The court and prosecuting attorney agreed that the purpose was to show what he (the agent) learned from that investigation (R. 446).

The court permitted the investigator, Campbell, to testify only that he had submitted a report to Glasser (R. 449). However, the investigator was then permitted to identify his report in the *Western Avenue* case, Exhibit 81 (R. 451), and this exhibit was then admitted in evidence over objection (R. 529). A similar report by investigator Sylvan White in the *Spring Grove* case was also admitted over objection (R. 532). McGreal, the assistant prosecutor, then read to the jury this report of investigator Campbell, together with the statements given by various witnesses to Campbell (R. 533). After objections by all, the court ruled that the contents of both reports were competent against Glasser alone (R. 534).

A full appreciation of the effect they must have had on the jury cannot be obtained without examination of these reports. Therefore, these original exhibits have been forwarded and are now on file in the office of the Clerk of this Court.

Exhibit 81A is an elaborate report of 25 pages containing first a "Chronological Narrative History" appearing to state established facts. Following this under the heading "TESTIMONY OF WITNESSES", there are set out at length the statements purportedly made to the agent by each of a large number of witnesses concerning the accused persons.

Exhibit 113 is almost identical in format except that much of the "TESTIMONY OF WITNESSES" is enclosed in quotation marks, thus adding to the prejudicial effect upon the jury. Not to be forgotten is the fact that in each of these reports Kaplan, one of the defendant alleged co-conspirators with petitioner, is referred to as the apparent organizer of the illicit distillery project there involved.

The feeble argument of the government is (Br. in Opp. p. 30):

> These reports were of course not offered for the purpose of proving the commission of the liquor violation therein described, but *to show what Glasser had before him* when he acted in these cases.[14] (Italics supplied.)

This can mean any of three things:

(1) That the report was offered to show that a report as to law violation by these defendants had been made to Glasser. But this cannot stand since the fact had already been established by testimony of witnesses and by the evidence that Glasser had presented the cases to grand juries (R. 5[redacted]2).

(2) That, irrespective of the truth or falsity of the statements contained therein, such statements had been made. But if the correctness of these statements be not assumed by the jury, then Glasser equally was entitled to treat them as false, and if so, of course they failed to show that anything was before him and were no criteria by which to measure Glasser's conduct.

(3) That all statements contained in the report were substantially true and therefore to be treated as evidence

[14] Even if otherwise available, these reports failed to satisfy even the test stated by the government, since Exhibit 113, a report dated July 1937 (R. 529) related to a case presented to the grand jury May 17, 1938 (R. 528). It is obvious that in that period important witnesses might well disappear or in other ways become unavailable. In fact, that is what happened in this very case (R. 536-537, 532).

available to Glasser, and upon the existence of which Glasser's failure to obtain more indictments was to be appraised. This, of course, was in fact the sole purpose for which they were offered by the government, and the jury was plainly intended to accept them as evidence of the existence of the facts therein stated. Nor was their introduction inadvertent; it was deliberate and purposeful after much verbal maneuvering (R. 446-451), and the reports were submitted to the jury as exhibits to be taken to the jury room with calculated regard to their effect. The record shows that the complete text of Exhibit 81A, together with the statements given by the various witnesses in connection therewith, was read to the jury (R. 533). While Exhibit 113 was not read to the jury, they were told in specific terms where they could find the chronological narrative, the list of witnesses, and the "available" evidence against each defendant involved in the operation of the still (R. 539-540). Indeed, the Government tacitly admits that these reports were submitted as proof of the facts stated therein, by relying on them and in citing to them as follows (Br. in Opp. pp. 6, 9):

> Available evidence was not used by Glasser upon these presentations (R. * * * 602).
>
> * * * * * * *
>
> The record discloses many instances of Glasser's failure to utilize available information and evidence in securing indictments * * * (R. * * * 602, 609).

Thus the government by these record references to the report in the *Spring Grove* case asserts in this case that such reports were "evidence." This attempt to evade the hearsay rule under the appearance of an exception thereto, is a subterfuge probably as old as the rule itself. It is the same evasion which was recently met by the stern refusal of this Court to lend the slightest countenance to a sophism

so plainly at war with preservation of the basic elements of fair trial. *Shepard* v. *United States*, 290 U. S. 96. There, with language peculiarly applicable to the attempted rationalization of the Circuit Court of Appeals that (R. 1132):

> The information contained in the reports * * * threw light upon the question

this Court said (p. 104):

> This fact, if fact it was, the government was free to prove, but not by hearsay declarations. It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to someone else.

Applying the holding of the *Shepard* case here, it is plain that it will not do to say that the jury might accept the report and statements contained therein for any "light" that they cast upon the question of whether reports of this law violation had been made to Glasser, and reject them to the extent that they tended to show the evidentiary facts of such violation. *United States* v. *Perlstein*, 120 F. (2d) 276, 282-283.

As this Court said in the *Shepard* case (p. 104):

> Discrimination so subtle is a feat beyond the compass of ordinary minds. * * * It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.

Furthermore, it is well established that in the presentation of evidence before a grand jury it is incumbent upon the prosecuting attorney to see that only competent evidence is introduced. *United States* v. *Farrington*, 5 Fed. 343, 347;

In re Grand Jury, 62 Fed. 840, 846. As was said in *United States* v. *Kilpatrick*, 16 Fed. 765, 771:

> The prosecuting officer is presumed to be familiar with the rules of evidence and it is his duty to take care that no evidence is received by the grand jury which would not be admissible in a court upon the trial of a cause. 1 Whart. Crim. Law, Sec. 493.

Therefore these statements of alleged facts contained in these reports were available as a measure of Glasser's duty only if made by the witnesses themselves—not in mere reports. As said by Mr. Justice Field, in charging a grand jury in California (*Charge to Grand Jury*, 30 Fed. Cas. No. 18,255, at p. 993):

> In your investigation you will receive only legal evidence to the exclusion of mere reports, suspicions and hearsay evidence.

All these principles are well established, and applicable here. Yet the government would deprive petitioner of his right of confrontation on the stated ground that the reports showed "what Glasser had before him" (Gov. Br. in Opp., p. 30).

2. ***His hostile cross-examination of petitioner and prejudicial remarks deprived the accused of an impartial trial.***— Usurpation of the functions of an advocate appears from the reiteration by the judge of the testimony of the chief clerk of the office of the United States Attorney that, of 20 cases presented to the April, 1937, grand jury, twelve no-bills were returned (R. 196):

> The Court: That is the total number of cases presented?
>
> A. By Mr. Glasser.
>
> The Court: To this Grand Jury.
>
> A. Yes, sir.
>
> The Court: And of the twenty there were twelve No Bills?

It is, of course, impossible to reproduce on the printed page the air of disapproval with which this rhetorical question was asked. Either the judge should have well known that there is no norm of true-bill percentage by which to test the honesty of a prosecuting attorney or, if ignorant of that fact, should have forborne such prejudicial comment on the matter. In aggravation, the court refused to allow in evidence the report of this same April, 1937, Grand Jury printed in the record which clearly explains that these no-bills were attributable to failures of the Alcohol Tax Unit (R. 789-795). This report further praised petitioner's work and expressed confidence in his ability, if unhampered, to bring to justice the real heads of the alcohol ring.

In another instance, the court by one sentence deprived petitioner of the benefit of facts highly significant to a vital part of his defense. In connection with the prosecution of Elmer Swanson, Anthony Hodorowicz and Clem Dowiat, upon which the Government heavily relied, the Government had shown a payment of $500 to Kretske (R. 244) and that subsequently the case against them had been by Glasser stricken from the docket with leave to reinstate (R. 1034, Ex. 226, 236, 238, 317). In explanation Glasser stated that he had stricken the case at the request of Ritter, investigator in charge of agents of the Alcohol Tax Unit; that in a recent conversation with Ritter the latter had recognized that the matter involved no wrongdoing on Glasser's part; and that despite Ritter's then stated belief that the Government was to call him as a witness, he had not been called although he had been in Chicago continually (R. 918-920). After granting the Government's motion to strike the statement that Ritter had been in Chicago ever since (R. 921), the court destroyed the weight of Glasser's testimony with the jury by his highly argumentative statement that (R. 921):

> "I will say now to the defendant he [Ritter] is subject to subpoena * * *. You have a right to bring him into this court if you wish."

Such a suggestion, even if made by Government counsel in summation, would have been highly improper because of its reflection upon Glasser's credibility. Coming from the judge, the prejudicial effect on the jury was greatly aggravated. The judge's statement was equally prejudicial in that, in so far as it implied a duty on the part of Glasser to produce such a witness, it deprived him of the benefit of his testimony as a foundation for the presumption that the testimony of the agent Ritter if produced would have been unfavorable to the Government. *Mammoth Oil Co.* v. *United States*, 275 U. S. 13, 52; *Chicago & N. W. Ry. Co.* v. *Kelly*, 84 F. (2d) 569, 572; *Kehoe* v. *Commissioner of Int. Rev.*, 105 F. (2d) 552, 554-555.

3. ***He made statements as of fact not shown by the evidence.***—Glasser, on direct examination rebutting earlier testimony, narrated his efforts to obtain testimony from a convict against one Abosketes by securing commutation of sentence for the convict and others (R. 936-941), all of whom had been prosecuted by him and given substantial sentences (R. 939).

During this examination of petitioner, without any previous reference having been made thereto, the judge assumed the role of witness in an effort to relate Abosketes to the alleged participation of Glasser in the putative conspiracy. The court interrupted to ask (R. 941):

> Q. Did you know at the time that Nick Abosketes was under indictment in the Eastern and Western Districts of Wisconsin?
>
> A. No, sir.
>
> Q. Did you make any inquiry?
>
> A. No, sir. You see my job was strictly prosecuting.
>
> Q. You were interested in getting Nick Abosketes?
>
> A. Yes, sir.
>
> The Court: Alright. Go ahead.

The effect of these statements was to impress upon the mind of the jury that Glasser was in some way related

to a transaction between one Brantman and Kretske as to which the Government had earlier offered evidence. This showed only that Brantman, on behalf of Abosketes, had paid $3,000.00 to Kretske and that Abosketes had not been indicted in Illinois (R. 647-649, 650-662, 664-673; see Gov't Br. in Opp., p. 33, note 25).

Later, again without relevance to the matter being pursued on direct examination, the judge interrupted to testify (R. 943):

> I think my impression was there were two indictments pending in Wisconsin against Nick Abosketes on February 25, 1938.

Later, again without relevance to the matter then being discussed, the judge reverted to the Abosketes matter (R. 1030):

> At my request the Government has furnished me with this. Let the record show that Nick Abosketes was indicted in the Western District of Wisconsin on January 27, 1936; and that he was indicted in the Western District of Wisconsin July 20, 1938.

He then continued (R. 1030):

> To the indictment in the Western District he plead guilty and was sentenced. * * * After that the indictment in the Eastern District was dismissed. It covered the same subject matter, I know that for a fact.

It thus appears that the court not only took the part of an advocate in cross-examination of Glasser but also undertook positively to testify as to facts not otherwise in the record. Even that was erroneous since his question (R. 941) stated that two indictments were pending against Abosketes on February 25, 1938 (R. 941), whereas the report furnished by the Government showed that the second was not returned until six months later (R. 1030).

The prejudicial effect of this conduct of the court in forcing upon the jury, by his own reiterated statements, the impression that Glasser in some way was connected with law violations by Abosketes was plainly beyond the ambit of permissible conduct by the trial judge. The impropriety of testimony by a judge of facts as to his own knowledge, subject as it usually is to no cross-examination, or other means of testing its verity (*Quercia* v. *United States*, 289 U. S. 466, 470; *Terrell* v. *United States*, 6 F. (2d) 498, 499) was aggravated in this case by the fact that the erroneous statement was used as the basis of an obviously prejudicial question addressed to Glasser by the court (R. 1022). There, referring to the efforts about February 25, 1938, of the District Attorney's office to obtain commutation of sentence in exchange for information from convicts, the court said (R. 1022):

> Q. Just a minute, on that point. Was it your solemn judgment that the cause of good government would be best promoted by turning these twelve defendants loose who had been convicted and in exchange have their testimony to convict Abosketas.
>
> A. Yes, sir. It was the judgment of myself, Judge Igoe and Mr. Herrick.
>
> Q. To turn twelve defendants loose on the streets who had been convicted of operating or involved in the operation of some still with Abesketes, in exchange for their testimony which might convict Abesketes, when Abesketes was at that time under indictment in the Eastern District of Wisconsin; is that your solemn judgment?

This obvious display of adverse criticism of Glasser by the court was based upon facts twice stated and testified to by the court as of his own knowledge.

The fixed purpose of the judge to keep the name of Abosketes before the jury and to give added weight to the

evidence concerning Abosketes is shown by his statement, the last made before the defendants rested (R. 1030):

> I happen to know something about Nick Abosketas.

4. ***His repeated acts of advocacy were a clear abuse of his prerogatives as a trial judge.***—The leading case on the subject, *Adler* v. *United States,* 182 Fed. 464 (C. C. A. 5), states the applicable rule as follows (p. 472):

> The impartiality of the judge—his avoidance of the appearance of becoming the advocate of either one side or the other of the pending controversy which is required by the conflict of the evidence to be finally submitted to the jury—is a fundamental and essential rule of especial importance in criminal cases.

This rule was repeatedly violated here.

Attempt to nullify testimony of witness.—Gross abuse of his position by the judge appears in the course of examination of petitioner's witness, District Judge Igoe. Earlier, an imputation of breach of duty had been attempted by testimony of Alcohol Tax Unit Agent Bailey that petitioner had failed to prosecute on a conspiracy count a large number of defendants named in the agent's report and had prosecuted only four on substantive counts (R. 708-709). To refute any inference of corruption, petitioner sought to show by Judge Igoe (who had at the time been his superior) that his action had been duly approved after review of the agent's report (R. 891, 902). The objectionable conduct of the court appears from the following (R. 901-903):

> Mr. Stewart: Yes. Isn't it a fact, Judge, that you studied that long report, calling your attention to this particular report here (indicating).
>
> The Court: He had undoubtedly hundreds of reports to look at.
>
> Mr. Stewart: Q. The particular report you have in your hand, I will give it the Exhibit number so there

won't be any mistake about it. Number 160, wherein Mr. Bailey, special investigator——

The Witness: A. I assume that report contains a detailed statement of what evidence would be submitted which would involve the Hodorowicz brothers.

Mr. Stewart: That is right. Now I will ask you first, was it not your first instruction to your assistant, Mr. Glasser——

The Court: Just a minute, Mr. Stewart, I am suggesting this, it was my impression the testimony that Mr. Bailey submitted this report to Mr. Glasser after he had completed this investigation which was some time after Mr. Glasser and Mr. Bailey had consulted with Judge Igoe.

Mr. Ward: That is my understanding.

The Court: That is why I thought the Judge ought to have a chance to study this particular report to see when it was submitted.

Mr. Stewart: My understanding of that, your Honor, is, Mr. Bailey came here from Washington.

The Court: Just a minute. Let me ask Mr. Bailey.

Mr. Bailey, you have already testified that you visited Judge Igoe who was then District Attorney with Mr. Glasser, with reference to the Hodorowicz brothers?

Mr. Bailey: Yes, sir.

The Court: At that time did you have this report that we have marked Exhibit 160? Did you have this report marked Exhibit 160 with you and did you submit it to Judge Igoe?

Mr. Bailey: I did not, sir.

The Court: That is my impression, there is some other report and Judge Igoe must have seen, I don't think it is fair to the Judge to confine him to this particular question of this Exhibit until he has a chance to examine it because my impression was Mr. Bailey had not completed his investigation at the time they called upon Judge Igoe and Judge Igoe said "Go out and complete your investigation", and then "Mr. Glasser, I want to hear further from you, and submit this to the Jury."

Mr. Stewart: That is not my memory of the testimony.

The Court: What is your recollection? Just a minute.

Mr. Bailey: Your Honor, I talked to him but on one occasion in my life, and that was on the 26th of January, 1938; at that time that report was not completed. I had no report with me on that occasion.

The Court: That is Exhibit 160.

Mr. Bailey: That is correct. I turned that report over in Mr. Glasser's office on April 21, 1938.

The Court: That is what I thought; that is what made me confused as to the report.

Thus the judge, after first gratuitously casting doubt on Judge Igoe's ability to recall the report handed to him, proceeded to interrupt the examination to refute his testimony by the judge's own statement of what purported to be a reiteration of the earlier testimony adduced from Agent Bailey (R. 708). The crucial point here, of course, was whether Judge Igoe had seen the report before directing petitioner to present the violations as substantive crimes. Yet, under the guise of solicitude for Judge Igoe, the court obfuscated the real issue, confirmed for the jury the credibility of the Government's witness, twice reiterated his impression of the earlier testimony as proving that Judge Igoe had never seen this report, indicated that Judge Igoe was mistaken in his testimony and effectually deprived petitioner of its benefit. In accomplishing this result he also interrupted the witness to examine agent Bailey who was seated at the prosecutor's table. It helped Glasser very little that his witness was finally able to testify that he had seen the report and had directed petitioner's actions (R. 903).

Wilful misrepresentation as to duty of petitioner.—By adroit questioning of witnesses with respect to the Stony Island still proceeding (*United States* v. *Anthony Hodorowicz, Clem Dowiat, & Elmer Swanson,* R. 231, 227, 232-233,

272) the judge caused the jury to obtain an entirely erroneous impression as to the effect of the evidence. In this case, the defendants (witnesses here) had been called before the court one time only—after indictment they were arraigned before Judge Woodward for the purpose of taking their pleas (R. 231-232, 235, 835-836); thereafter, because the Alcohol Tax Unit agents had been unable to obtain sufficient evidence, this case was stricken from the docket with leave to reinstate (R. 920, 1034, Ex. 226, 236, 238, 317). The docket of the United States Attorney shows that as late as the date of trial, February 6, 1940 (R. 97), approximately ten months after Glasser left office, April 15, 1939 (R. 912), the Government had not yet seen fit to reinstate the cause (Ex. 226, introduced at R. 1034).

Despite the fact that the status of the case had thus been clearly established, and despite the fact that the prosecuting attorney had stated that the court appearance of these defendants before Judge Woodward was only for arraignment (R. 231), the judge violently distorted the effect of this evidence by asking one of the defendants (Anthony Hodorowicz) the question (R. 346):

> You were never convicted, never paid a fine and never went to jail?

In examining another witness accused in the same pending indictment, the court asked (R. 232):

> The case just dropped out of mid-air?

Since the effect of the striking with leave to reinstate was to leave the indictment still pending (R. 920), the witnesses in each case gave the indicated answer. The consequent inference by the jury that Glasser had by some legerdemain permanently prevented prosecution of this charge was well nigh irresistible.

Further examining one of the same witnesses (Anthony Hodorowicz) the court plainly misled the jury on this same

matter to the great prejudice of petitioner. There is, of course, no presentation of evidence upon a mere arraignment. Yet, despite the plain state of the record showing the proceeding in issue was an arraignment only for the purpose of taking pleas after indictment (R. 231-232) and that the case was still pending, having been merely stricken from the docket with leave to reinstate (R. 236, 238, 317), the trial court persisted in treating an arraignment as though it should have been a trial (R. 347-348):

> The Court: Were the facts brought out before the Judge in your presence, so that the Judge knew the facts?
>
> A. No.
>
> * * * * * * *
>
> Q. Was there a full disclosure of facts made before Judge Woodward, as to your connection in that case?
>
> A. No, not that I heard of. I was sitting at the bench.
>
> Q. Were you called before the Judge at any time?
>
> A. Just to mention our names, to be present.
>
> Q. The Judge did not ask you any questions?
>
> A. No.
>
> Q. The lawyer didn't ask you any questions in front of the Judge?
>
> A. No.
>
> Q. Did Mr. Glasser ask you anything in front of the Judge?
>
> A. No.
>
> Q. So you don't know,—your recollection is that there was not a complete disclosure of all the facts that connect you with that case, before the Judge?

No more obvious or calculated attempt by a judge to condemn a defendant in the eyes of the jury could well be imagined. Had the court instructed the jury that failure to disclose all facts on an arraignment was breach of duty on the part of petitioner, it could be made the basis of an

assignment of error. But what protection has he against innuendoes such as these?

Hostile questioning of petitioner.—A shocking disregard of his duty to preserve an impartial attitude well exemplifying the hostile atmosphere in which this case was tried is portrayed in the cross-examination by the judge of Glasser with regard to the libel case against *One Chrysler Sedan* owned by Rose Vitale, wife of Leo Vitale (R. 222). This will be plain when the circumstances are understood. The Government had earlier sought to make it appear that Glasser had suppressed evidence contained in a report as to this car furnished by the Alcohol Tax Unit (R. 218-224).[15] Judge Barnes, before whom the case was tried, testified on Glasser's behalf that the report was read to him; that he knew that the car was owned by the wife of a bootlegger; that the case was tried on this statement because it contained what the agent expected to prove (R. 717-718); and that this statement clearly required the return of the car (R. 718). The prosecuting attorney, on cross-examination, by questions implied that in another report concerning a criminal case, in which Leo Vitale had been no-billed, there were statements that a Chrysler car was found on the premises of the Vitale home (R. 1000).[16] When Glasser stated that in presentation of the libel case

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[15] It is to be noted that the testimony of the Alcohol Tax Unit Agent, Dowd, that he had seen this car used in violation of the liquor laws (R. 219) and that such evidence was in his report (R. 224) is completely misleading and is refuted by examination of the report read to Judge Barnes in this case, Ex. No. 36 (see R. 224, 717), which was a report not made by Dowd but by one Barratt O'Hara, Jr. This exhibit, No. 36, on file in this Court, found in an envelope marked Ex. No. 229 (see R. 1100), is attached to a letter from Yellowley to the United States Attorney stating that it is "in regard to the merits of the claim of Rose Vitale." This report contains not the slightest mention of evidence of use of the car in law violation.

[16] This, of course, was merely cumulative of the statement in the agent's report in the civil libel suit as to the place in which the car was seized (R. 717, Ex. No. 36).

he did not mention Leo Vitale, the judge embarked on a course of cross-examination calculated plainly to convey to the jury his hostile attitude toward petitioner (R. 1000-1002). Aside from distorting the petitioner's answers (R. 1000-1001), the court restated the earlier testimony of agent Dowd, thus indicating to the jury the judge's acceptance of it as true.

Hypothetical question without foundation in the record. —Finally, the court went so far as to engage in the glaring, and we submit inexcusable error, of asking Glasser a hypothetical question based on facts utterly without foundation in the record (R. 1001-1002).[17] Despite its unfounded character, Glasser could not but answer in the affirmative that the facts thus assumed would be good evidence that the automobile was being used to defraud the United States (R. 1002).[18] The purpose of the question clearly was to keep before the jury the assumption of damaging evidence which could not be proved and thus to impress upon their minds the existence of assumed and non-existent facts. To say that such a course would not be prejudicial to petitioner

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[17] The hypothetical question was: "Isn't it a fact, Mr. Glasser, if an automobile is found on the premises where there is also found an unregistered still, that if it is found within the enclosure, and you have got evidence which can establish that the particular automobile found within the enclosure of the unregistered still, was on numerous occasions followed by the Alcohol Tax Unit, and observed and seen cans of alcohol being placed in it, and license number changed on it, and traced to the premises where the still is actually found, do you consider that fairly good evidence that the automobile was being used to defraud the United States Government out of the taxes on alcohol?

[18] Petitioner has noted carefully the testimony of agent Dowd (R. 219) concerning alleged use of this car to haul sugar, bootleggers and to trail carloads of alcohol. Aside from the fact that such conclusions by an agent would be inadequate evidence for forfeiture, it is plain that neither this testimony nor any other part of the record supports the hypothetical facts assumed by the court.

is to ignore human experience and the dictates of common sense.

While the court and the prosecuting attorney made reference to a criminal file and by their questions attempted to imply that it contained the facts assumed by the judge (R. 1002), it is highly significant that this criminal file was neither marked for identification nor offered in evidence. This plain breach of an elemental rule of evidence not by an advocate but by the presumably impartial judge is, we submit, inexcusable. Certainly, no one could reasonably contend that it is not prejudicial.

This same cross-examination by the court was also in clear violation of the well-recognized rule that, whatever the defendant's position, the court's right to examine the witness stops short of any questioning which might in any way hamper the defendant in the presentation of the theory of his defense.

VII

THE IMPROPER CONDUCT OF THE PROSECUTING ATTORNEY CLEARLY VIOLATED THE RIGHT OF PETITIONER TO A FAIR AND IMPARTIAL TRIAL AND IMPAIRED HIS STATUTORY RIGHT OF APPEAL

That there is a burden upon the United States Attorney as a quasi-judicial officer to aid and maintain the proper judicial atmosphere and, in doing so to prosecute the defendant solely on the facts of the case by legitimate methods, is well recognized. Improper questions, statements not based upon evidence, and browbeating of witnesses is forbidden. All these are prohibited because they tend to distract the minds of the jurors from the actual facts and real issues and create against the defendant a prejudice born of the fact that the district attorney is recognized as a public officer, who has apparently no personal interest in the case and who is interested solely in obtaining justice.

A few of the multitude of instances of misconduct by the prosecuting attorney which destroyed all semblance of a fair trial in this case may be briefly set forth:

1. ***During the trial the prosecuting attorney wrongfully deprived petitioner of access to exhibits admitted in evidence.***—During the cross-examination of the petitioner, he was questioned as to some of the thousands of cases handled by him. The files relating thereto had already been put in evidence by the government. Without authorization by the court, these exhibits were kept in the possession of the prosecutor who, although ordered to show them to petitioner during a week-end recess, refused to do so on the frivolous ground that petitioner was not accompanied by his attorney (R. 980, 982-983).

In the first place the ordinary safeguarding of the interests of parties litigant requires that exhibits once submitted in evidence be retained in the possession of the clerk of the court.[19] In any event it is clear that a defendant has an unqualified right to examine such exhibits. Here the denial of such right to petitioner forced him to state in truth, but with naturally prejudicial effect on the jury, that he did not remember the various cases referred to by the prosecuting attorney (*e. g.* R. 957-964, 967, 969, 971-972).

2. ***The prosecutor removed from the office of the Clerk and lost exhibits deposited with the Clerk forming part of the record in this case.***—The violation of the requirement that the record be retained in the hands of the Clerk also culminated here in the consequences which the rule seeks to prevent. The exhibits were taken by the Government from the courtroom on the day the verdict was returned,

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[19] Rule 16 of the District Court for the Northern District of Illinois provides: "After being marked for identification, models, diagrams, exhibits and material forming part of the evidence in any cause pending or tried in this court, shall be placed in the custody of the clerk unless otherwise ordered by the court."

March 8, 1940, and retained almost five months until demanded by the Clerk of the Circuit Court of Appeals on July 31, 1940 (R. 1094, 1096). Although the Government first stated that all the exhibits admitted in evidence at the trial had been transmitted to the Clerk of the Circuit Court of Appeals (R. 1096), petitioner showed, and the Government finally admitted, that certain exhibits (Nos. 198, 205, 206 and 208) were missing (R. 1098, 1100). The Government sought to avoid responsibility for loss of these exhibits by the naked assertion of the prosecutor that they had never been in his possession (R. 1100, Gov't Br. in Opp. 38, note 30).

The following analysis of the record shows, however, that the Government had possession of the exhibits in this case from the date the verdict was returned, March 8, 1940, until July 31, 1940. The petition of the defendants for production of missing exhibits (R. 1094-1095) alleged that, until the latter date, "no exhibits had been forwarded to the Clerk" of the Circuit Court of Appeals and that on that date the Clerk of the District Court, upon demand of the Clerk of the Circuit Court of Appeals therefor, merely referred him to the Assistant United States Attorney; that on the same date certain exhibits were by the United States Attorney delivered to the Clerk of the District Court and on August 2, 1940, by him certified to the Clerk of the Circuit Court of Appeals (R. 1095).[20] The answer of the United States Attorney (R. 1096) admitted all of these allegations and affirmatively stated—

> all of the exhibits in the trial of the case [with an exception not here pertinent] are in the possession of the Clerk of the Circuit Court of Appeals.

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[20] Indeed, the certificate of the Clerk of the District Court embodies a receipt to the United States Attorney and shows that transmission and certification was confined to the exhibits received from the United States Attorney (R. 1075).

But when further pressed for the production of seven exhibits omitted from the certification by the Clerk, including Exhibits 205 and 206 (R. 1098), the United States Attorney asserted merely that these were defendants' exhibits and had never come into his posession (R. 1100). It is pertinent to note that all of petitioner's other exhibits were received by the United States Attorney at the close of the trial and were subsequently by him delivered to the Clerk of the District Court. See Glasser's Exhibits No. 197, R. 912; No. 199, R. 913; No. 202, R. 921; No. 203, R. 922; No. 204, R. 948; No. 207, R. 953, all shown by the Clerk's certificate to have been received from the United States Attorney (R. 1075, 1088). Finally, the admission of the United States Attorney that he had asked Glasser for "copies of certain exhibits" (R. 1095-1096) tends to confirm that he had earlier discovered his loss of the originals of these exhibits. The United States Attorney took these exhibits from the custody of the Clerk with the consent of only one defendant, and in any event cannot be permitted to dodge responsibility with mere denial of receipt.

Two of these missing exhibits, Nos. 205 and 206, were vital to petitioner's cause in the Circuit Court of Appeals and are just as vital in this Court. They were periodic reports of petitioner to his superiors, made contemporaneously with the disposition of the cases here complained of by the government and showing in each case the reason for and manner of their disposition (R. 952). The Circuit Court of Appeals had no opportunity to read these exhibits before entering its findings in this case. Petitioner was thus deprived of the substance of his right of appeal.

3. ***After trial, the prosecutor, McGreal, unlawfully mutilated exhibits constituting a part of the record in this case.*** Examination of the original exhibits in this case made by counsel after their transmission to this Court has led

to the discovery for the first time that Francis McGreal, an assistant United States attorney, who took an active part in the trial of this case (R. 186), after the trial and before the hearing in the Circuit Court of Appeals unlawfully mutilated such exhibits. The mutilation was by adding to these exhibits writings whose content must necessarily have been highly prejudicial to the petitioner on appeal.

Exhibit No. 130 is a file envelope in the case of *United States* v. *Louis Kaplan, Edward R. Dewes, Victor Raubunas, Joseph F. Cole, Louis Pregenzer, Lincoln Rankin and Ralph Bogush*, D. C. 31591 (R. 1083). Examination of this file envelope shows on its face the following endorsement:

> 4-30-1940—Caplan—Pleads Guilty—14 Months to run Concurrently with 31825—Stay Execution 30 days Mo. of Gov. Dewes & Rabunas S. O. L.

This endorsement is signed F. J. McGreal. It and additional endorsements which appear immediately under it, bearing dates May 28, 1940 and June 3, 1940, also signed by McGreal show the disposition of cases against the other accused persons "Cole, Pregenzer, Rankin and Bogush". As a result, the District Court Clerk's "Certificate to Exhibits" describes this exhibit as "bearing notations as to sentencing of defendants" (R. 1083).

Post-trial addition of evidence by the Federal prosecutor, McGreal, is plain.[21] The dates of these endorsements show conclusively that they were made long after the return of the verdict in petitioner's trial, March 8, 1940 (R. 101).

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[21] R. S. § 5403, 18 U. S. C. § 234 provides: "Whoever shall wilfully and unlawfully conceal, remove, mutilate, obliterate, or destroy, or attempt to conceal, remove, mutilate, obliterate, or destroy * * * any record * * * paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than $2,000, or imprisoned not more than three years, or both."

Hence, they could not have appeared on the exhibit at the time of the trial. The dates of the endorsements also show that they were made during the period in which the office of the United States attorney had possession of the exhibits in the case, *i. e.*, from March 8, 1940, to July 31, 1940 (R. 1094-1095).

Calculated purpose on the part of McGreal to thus prejudice Glasser's appeal and the reason for his choice of means are both apparent. At the time Glasser was sentenced the court said (R. 1064):

> * * * You withheld testimony from that grand jury that resulted in the indictment of these men that were later indicted and were convicted.

This statement, being untrue and without support in the record, caused Glasser to answer (R. 1064):

> Nobody was ever indicted and convicted that I no-billed.

This highly significant fact, of course, was of the greatest importance both in the trial court and in the Circuit Court of Appeals and in this Court. McGreal who was present, and ready to make corrections (R. 1065), stood silent.

But thereafter McGreal undertook to remedy this flaw. Kaplan, Raubunas and Dewes, who had been no-billed upon Glasser's presentation of the so-called *Spring Grove* case (R. 528), were at the time of the sentence of Glasser under indictment returned on a presentation made after Glasser left office, but had not yet been tried.[22]

After conviction and sentence of Kaplan in the instant case as a co-conspirator of Glasser, McGreal was able with

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[22] The indictment earlier obtained by Glasser against the other five men referred to in McGreal's addition to Exhibit 130 was shown by Exhibit 129. This exhibit also bears a pencilled endorsement by McGreal also dated after the close of the trial showing dismissal of this earlier indictment. It merely completes the narration as to their reindictment which is shown by Exhibit 130.

case, in view of the testimony of Dewes (R. 537-556) and Raubunas (R. 452-527) at the trial of the instant case, to obtain Kaplan's plea of guilty, sentence thereon to be served concurrently with that imposed in the *Glasser* case.[23]

4. ***Prosecutor Ward, by his leading questions, assumed the role of a witness.***—The prosecuting attorney was forced frequently to resort to the most obvious sort of leading questions to put into the mouths of witnesses testimony which would in some way involve a mention of petitioner's name. He persisted in assuming that witnesses had said things not said, and persistently examining them upon those assumptions. An example occurs in the direct examination of one Swanson, then subject to an alcohol violation indictment in Cleveland as well as another in Chicago.[24] Unsuccessful in his attempt to have the witness mention petitioner's name either directly or indirectly in relation to conversations had with third persons, the prosecutor by asking the following leading question in effect became a witness (R. 230):[25]

> Q. And Dan was to get part of the money that was given him?

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[23] See Exhibit 130. But as to the other two (Raubunas and Dewes), no-billed on Glasser's presentation, but indicted on a new presentation after Glasser had left office, the endorsement on Exhibit 130 indicates that McGreal struck the case with leave to reinstate as is indicated by the endorsement after their names: "S. O. L." (The reason for this curious failure of McGreal to prosecute these men who, by their own testimony in the Glasser case, were guilty of law violation with Kaplan in the Spring Grove case (See R. 499, 550) is conjectural. It may be noted, however, that the continuing existence of this indictment—the case merely being stricken with leave to reinstate—plus their recorded testimony in the Glasser case would be a Damoclean deterrent should they at any time be inclined to retract their testimony against Glasser in this case).

[24] Note the admission of this witness "I would rather commit a little perjury than go to the penitentiary" (R. 235).

[25] The attorney for defendant had just objected to the same sort of questioning by the prosecutor without being able to obtain a ruling on his objection (R. 229). The objection was clear and counsel by continuing objections would only have made the question more prejudicial by thus continually calling them to the attention of the jury.

A. Well, I don't know if he said Dan or Red, or something like that, either one.

The sworn witness having been thus instructed, Ward continued (R. 230):

Q. Either what?
A. Either one, Red or Dan.
Q. Didn't you know at that time who Kretske was referring to as Red?
A. Yes.
Q. Who?
A. Well, it was Glasser.

Standing alone, this leading question, while unquestionably error, might not be deemed reversible error. As a matter of fact, however, this testimony by the prosecuting attorney under the guise of a question was the only "evidence" which tended in any way to connect Glasser with the alleged "fixing" of this so-called *Stony Island or 69th Street Still* case (R. 229), as to which there was much testimony and as to which the judge led the jury to believe Glasser guilty of misconduct.[26] Other than Government Agent Bailey, whose testimony tended to show no misconduct by Glasser (R. 706-711), the Government produced as to this case five witnesses, the first three of whom had been indicted for operation of this still (R. 231):[27]

(1) Swanson, who testified to the payment of money to Kretske (R. 229-231) but implicated Glasser only upon the leading question under discussion;

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[26] See the prejudicial and utterly unfounded intimation to the jury by the judge that Glasser in this Stony Island still case was guilty of misconduct in failing to have obtained convictions, fines, or imprisonment and in failing to present evidence at an arraignment although this case had been merely stricken from the docket with leave to reinstate at the request of an Alcohol Tax Unit agent, because of lack of available evidence. *Supra*, pp. 49-51.

[27] It will be recalled that this case was stricken from the docket with leave to reinstate at the request of the agent in charge of the Alcohol Tax Unit investigators (R. 918-921).

(2) Clem Dowiat, whose testimony showed no mention of payment to Kretske or mention of Glasser (R. 268-277);

(3) Anthony Hodorowicz, whose testimony (R. 342-354) showed merely that the defendants had employed Kretske as a lawyer (R. 344-345, 347) and included no mention of Glasser;

(4) Christ Del Rocco, who testified that he was present at two meetings with Kretske, one in Frank Hodorowicz's store and the other in Kretske's office, at the second of which $500.00 was alleged to have been paid Kretske (R. 244);[28] none of this testimony as to the alleged "fix" in this case shows any reference to Glasser (R. 242-248);

(5) Frank Hodorowicz, whose testimony as to this case shows he paid $500.00 to Kretske "to take care of the case" (R. 297-298), but fails to show any mention of Glasser.

It is thus apparent that all of the voluminous testimony failed utterly to show any relationship to Glasser. The only showing of payment of money to, or other relation of, Glasser, therefore, was the testimony of the prosecuting attorney in his leading question (R. 230):

> And Dan was to get part of the money that was given him [Kretske].

Thus the adverse commentary questions of the court—that this case "dropped out of midair" after the arraignment in this case (R. 232) and that no convictions or fines resulted (R. 346) and that there was insufficient disclosure of the facts (R. 348)—had prejudicial effect[29] as to Glasser only by reason of this testimony of prosecutor Ward.

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[28] It should be noted that the testimony of this witness at R. 243 is with regard to payment of money to Horton in connection with the seizure of a different still—located on 119th Street.

[29] See, *supra*, p. 49-51.

This example well demonstrates the tremendously prejudicial effect which may lurk in a single testimonial question by a prosecutor.

The recurring and persistent practice on the part of the prosecuting attorney in causing witnesses by leading and suggestive questions to give testimony of the type deemed favorable to the Government's cause is well exemplified at pages 229, 244-245, 289, 296, 301, 303-306, 380, 573, 612-613, 636, 659-660, 703 of the record.

5. ***The prosecuting attorney read to the jury only part of the testimony of a witness before the grand jury, deliberately leaving the jury to infer, contrary to fact, that this was the only testimony given by the witness.***—In support of its contention that petitioner had corruptly caused the grand jury to no-bill a case against co-defendant Kaplan, the Government attempted to show that a principal witness, one Cole, was not properly examined as to his knowledge. The prosecutor asked and secured "leave at this time to read his [Cole's] testimony before the May, 1938, grand jury," Exhibit 96 (R. 574). The testimony by Cole therein contained and read by the prosecutor relates exclusively to his illness.

This mode of identification by the prosecutor[30] was plainly calculated to indicate to the jury with obvious prejudice to Glasser that the Exhibit from which he read contained all of Cole's testimony.

Examination of this exhibit shows in the first place that it purports only to be the testimony taken at a grand jury session at 2 P. M. on Tuesday, May 17, 1938. In the second place, the testimony of Cole therein contained and read to

[30] Morgan, the chief clerk in the office of the United States Attorney (R. 186) had earlier identified Exhibit 96 as "the transcript of testimony taken before the grand jury on May 17, 1938 (R. 529). But the exhibit was never properly authenticated by a witness, subject to cross-examination as to its accuracy or completeness.

this jury by Ward is confined to facts as to his illness. It contains not an iota of testimony as to law violation by any person.

The record conclusively shows (1) that he was examined at least twice before the grand jury and (2) that he did testify as to the merits of the case. Cole himself testified (R. 576):

> I came down here before the grand jury and I was asked questions which brought up about Kaplan and different things, and I told them all I know about it.

The foreman of the May, 1938, grand jury, Gates, testified (R. 606):

> I know that some of the jurors wanted to get Mr. Cole back, they thought he knew more than he told us. That was what they assumed. * * * At the time we wanted to call Mr. Cole back was at a time when Mr. Cole was before us twice at that same session.

And (R. 607-608):

> I examined him [Cole] concerning whatever knowledge he may have concerning that still. After I did that and he went out of the room some of us were dissatisfied with the way he answered his questions. * * * We requested Mr. Glasser to have him brought back in, and he was brought in. And then some more questions were asked him about the still, or whatever knowledge he might have on it.

The Government has asserted (Br. in Opp., p. 39):

> But there is much in the record to indicate that Cole did not testify concerning the merits of the case under investigation (R. 531, 590, 606, 925).

We beg the indulgence of the Court in considering these citations at length. We do so, first because they clearly fail to support the Government's statement and, more important, because they forcefully demonstrate that this Court

can decide this case only by direct reference to the record.

The first is the statement of Investigator White (R. 531):

> At this time two or three witnesses were called. Joe Cole was called as a witness this time but was only in the Grand Jury room for a period of about two minutes.

Since Exhibit 96 shows ten witnesses Investigator White plainly refers to an appearance by Cole before the grand jury at a time other than that shown in Exhibit No. 96, it thus appears from this testimony that Cole was brought before the grand jury at least twice.

The second Government citation apparently is to testimony of Ellis, Secretary of the May, 1938, grand jury (R. 590):

> Well, before Mr. Cole was brought in we were informed that his testimony really didn't have to be considered because the information, most of it, was relative to Mr. Cole's illness and certain conditions which led us to believe that he perhaps—well, you might say was not mentally all there. When the question was brought up—when Mr. Cole was being examined by Mr. Glasser he asked him practically only questions relative to his physical condition when he was in the hospital, and so forth.

The witness obviously testified only as to the appearance of Cole which is covered by Exhibit No. 96. As this witness does not deny, and as we have shown that in fact there were other appearances by Cole, this testimony utterly fails to support the Government's statement: "But there is much in the record to indicate that Cole did not testify concerning the merits of the case under investigation."

The next citation of the Government is to R. 606, the testimony of the grand jury foreman Gates, set out immediately above, who expressly stated that Cole was twice questioned about the still (R. 606-608).

The final citation is to Glasser's statement (R. 925) as to why he examined Cole only as to his physical condition the last time he brought him before the grand jury.

The record clearly demonstrates that the prosecuting attorney wilfully read but a small and irrelevant portion of Cole's testimony before the grand jury and by submitting it to the jury in the form of an exhibit intended to leave with them the lasting impression—in disregard of the easily forgotten oral testimony—that Glasser made no attempt to obtain incriminating evidence from Cole.

6. ***The prosecutor persisted in the putting of specious questions, the plain purpose and effect of which were to impress on the minds of the jury the probability of the existence of the assumed and damaging facts on which the question was based although they were not and could not be proved.***—In questioning William Workman, who had been indicted for liquor violation in June, 1935 (R. 193) and who pleaded guilty and was placed on probation (R. 202, 203, 209), prosecutor Ward insinuated that Glasser was guilty of a breach of duty by asking, over objection, whether Glasser had subsequently called him into his office to talk about the case. The court approved the question (R. 209). This innuendo that Glasser sustained any such duty to call in a prisoner on probation was a vicious and utterly unfounded attempt to impress the jury with the existence of wrong-doing by Glasser.

In another instance, United States Commissioner Walker testified that in a case in which Glasser represented the Government he discharged a prisoner, one Kwiatowski, for lack of probable cause (R. 289). The Government's own evidence shows that all available evidence had there been presented (R. 397-399). Yet the prosecutor persisted in asking the Commissioner (R. 289):

> It does not mean that there may not be probable cause but that it was not shown to you.

He, of course, received the appropriate answer. The prosecutor could have had but one purpose and the question could have had but one effect—to lead the jury to believe, without any basis, that there was other evidence available to and suppressed by Glasser.

Again, Federal District Judge Woodward, having testified that he had never observed conduct by Glasser contrary to his conscientious duty (R. 738), the assistant prosecutor, joining in the practice of mean insinuation, asked (R. 739):

> Judge, all that you have testified to here was to facts that occurred in your court room?
>
> • • • • • • •
>
> You have no information as to what occurred outside of your court?

And again, he pursued the same objectionable course by asking Judge Woodward as to the trial of a case conducted by Glasser (R. 737, 741):

> You had no information other than that given to you by the United States Attorney in charge of that case.
>
> • • • • • • •
>
> And what you heard in the court room, that was presented by him.
>
> • • • • • • •
>
> And that is all the information you had at that time?

The trial in that case had ended in a conviction but even so the prosecution could not abate its fixed policy of damning Glasser by utterly unfounded insinuation that he had suppressed evidence.

Typical again of the practice of prosecutor Ward is his assumption of the role of an unsworn witness to testify to facts not otherwise in evidence. In the cross-examination

of Judge Igoe, after referring (R. 907) to H. L. Welch, indictment against whom was dismissed for want of prosecution (R. 195), and Swanson and Dowiat whose case had been by Glasser stricken from the docket with leave to reinstate (R. 274, 231, 236, 238), the prosecutor made the flat statement (R. 908):

> That is the point. I say you don't know them, but Mr. Glasser does know them.

Thoroughly confirmed in his purpose to testify as a witness, the prosecutor then embarked on the following cross-examination (R. 909):

> Q. Now, the Workman case, you didn't know that Daniel Glasser knew a man named Sheenie Albert, did you, Judge?
>
> A. No, sir. I don't know it now.
>
> Q. And you didn't know that he ever visited 1062 Polk Street, and tooted his horn, and a man came out of that place, and who was in that Workman case and held a conversation with him, you didn't know anything about that, did you?
>
> Mr. Stewart: I object to that, Your Honor, that never happened.
>
> The Court: There is testimony here in the record to that effect.

Here the prosecuting attorney abandoned all pretense and by these bold assertions sought to supply evidence which he had previously sought and failed to obtain. Plainly inadmissible testimony of Government witness Svec from which the jury might have been urged to imply Glasser's friendship with Albert (R. 563) had been stricken (R. 569). Agent McFarland had testified to an answer by Svec in an office interview with Glasser admitting he had never seen Glasser with Albert (R. 584) and Svec had testified that in so admitting he was there answering Glasser truthfully (R. 566).

In no way disheartened, however, Ward not only thus proceeded himself to testify to these things as facts but obtained the equally reprehensible corroboration of the judge who stated (R. 909):

> There is testimony here in this record to that effect.

All this, despite the utter lack of any testimony to support such statements.

Citation of authorities to show the uniform disapproval of such conduct by a United States Attorney would be superfluous in view of this court's recent and thorough discussion of the conduct required of prosecuting officers in the trial of accused persons. *Berger* v. *United States*, 295 U. S. 78, 88-89. The public interest in the fair and impartial conduct of criminal trials and that verdicts of juries be rendered only on proofs submitted pursuant to the well-established rules of evidence imperatively requires reversal in this case. *New York C. R. Co.* v. *Johnson*, 279 U. S. 310, 318-319. Cf. dissent of Mr. Justice Roberts in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 264, in a case tried before the same judge who presided in the instant case.

7. ***The prosecutor surreptitiously caused to be submitted to the jury pre-trial statements corroborative of the testimony of Government witnesses.***—Exhibit 92 now on file with the Clerk of this Court is a pre-trial written statement of Government witness Raubunas dated October 20, 1939. This Exhibit 92, at pages 4, 5 and 7, in practically identical words, contains statements the same as those made by Raubunas in his oral testimony at the trial in which he asserted that he had seen Kaplan enter an automobile occupied by Kretske and Glasser on three separate occasions in April, 1936 (R. 456-457), in May, 1936 (R. 457-458), and in October, 1936 (R. 461, 462). The prejudice to Glasser of this testimony and particularly its corroboration by the pre-trial written statement is obvious.

The trial court sustained objections to the introduction of this Exhibit 92 (R. 712). But it clearly appears that this exhibit was surreptitiously included in a group of 33 exhibits submitted by the Government at the close of defendant's case and taken to the jury room (R. 1034). The United States attorney took the position that Exhibit 92 had not been formally received in evidence (R. 1100). The opinion of the circuit court of appeals held (R. 1132):

> It also appears that on May 17, 1940, the trial court entered an order directing the Clerk of the District Court to certify and send to this court all of the exhibits introduced on behalf of the parties. The Clerk of the District Court, in so certifying, does not certify that Exhibit 92 was sent to the jury. From the record thus appearing we are unable to say that these exhibits were sent to the jury.

The Government has adopted this theory (Br. in Opp., p. 40).

The vitiating flaw in this argument is that, despite the order of the district court to which the circuit court of appeals refers (R. 1092), the clerk declined to state in his certificate that "*all*" exhibits introduced at the trial were by him certified and transmitted. His certificate states that he transmits only "*certain*" exhibits (R. 1075). The bill of exceptions thus stands uncontradicted and the conclusion of the circuit court of appeals and the Government is utterly unfounded.

The contention of the Government places it on the horns of a dilemma.—The Government's view is that, despite the inadequacy of this certificate of the Clerk of the District Court, the certificate is to be accepted as conclusive in determining the exhibits which were submitted to the jury. But if we accept this position, the Government is put in no better case, since then the result is to conclusively show the submission to the jury of another and similar pre-trial

statement by Dewes, a Government witness, corroborative of his oral testimony and just as clearly constituting reversible error for the same reason. The certificate of the clerk includes as "exhibits which were introduced in the case," Exhibit No. 115 "Statement of Edward R. Dewes to W. S. Devereau, Special Agent F. B. I., dated October 20, 1939, etc." (R. 1075, 1081-1082).[31] In this pre-trial statement on file with the Clerk of this Court, Dewes, a Government witness, stated that on May 17, 1938, he gave $100 to Kretske for a no-bill and that Kretske said he would send it to the "redhead," an Assistant United States Attorney in the Federal Building. Dewes' oral testimony on the trial was in almost identical language (R. 542-543).[32] The highly prejudicial nature of this testimony is emphasized by the evidence that on the same day, May 17, 1938, a no-bill was returned against Dewes (R. 529).

The Government can make its choice. But it cannot play fast and loose in this Court. Either the bill of exceptions controls and it must be accepted that Exhibit 92 was submitted to the jury, although excluded by the judge, or, in the alternative, the certificate of the Clerk is conclusive of the fact that Exhibit 115 was submitted to the jury although apparently never offered or received in evidence.

In either case the record shows that there was submitted to the jury a pre-trial statement corroborative of the oral testimony of a Government witness at the trial.

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[31] The bill of exceptions fails to show that this Exhibit was ever offered or received in evidence Cf. R. 551.

[32] This oral testimony of the witness may be compared with the language of the pertinent parts of his pre-trial statement (Exhibit 115, p. 6):

"Kretske told me when I gave him the $100.00 on May 17, 1938, that he was going to send it over to the 'redhead', and he said that the 'redhead' would have a no bill in my case. I did not know the true identity of the man he referred to as the 'red-head' at that time, but I know now that Kretske was referring to an Assistant United States Attorney in the Federal Building at Chicago."

There can be no question that admission of such a pretrial written statement corroborative of, or consistent with, such highly damaging testimony of a witness at a trial is prejudicial error requiring reversal. *Vicksburg & Meridian Railroad* v. *O'Brien*, 119 U. S. 99, 101-103; *Brady* v. *United States*, 39 F. (2d) 312, 315 (C. C. A. 8); *Dowdy* v. *United States*, 46 F. (2d) 417, 424 (C. C. A. 4) and authorities cited.

VIII

THE EVIDENCE IN THIS CASE FAILS UTTERLY TO SHOW THAT GLASSER WAS A PARTY TO ANY COMBINATION OR AGREEMENT BETWEEN THE ALLEGED CONSPIRATORS OR THAT HE WAS A KNOWING PARTICIPANT IN ANY COMMON AND UNLAWFUL DESIGN

All of the persons indicted with petitioner denied having ever given or promised Glasser any bribe or having ever conspired with him either to solicit bribes or for any other purposes (R. 799, 722, 755, 837-838). There was no evidence of any kind, either direct or indirect, that Glasser ever received a bribe and none that he ever solicited any. Indeed, the prosecutor stated (R. 154): "There isn't anything in this indictment that says that anybody paid Glasser a bribe." The Government's vague theory was that "There was a conspiracy on foot to solicit certain persons to make promises" (R. 154).

As pointed out above, pp. 6-7, and as appears from the analysis of the evidence contained in the opinion of the Circuit Court of Appeals (R. 1122-1127), the proof offered by the Government to show guilt on the part of Glasser consisted merely of showing that money for the purported corruption of petitioner or others (third persons) had been paid by accused persons to certain of petitioner's co-defendants for the promised "fixing" of their cases.

The gist of the offense, of course, is agreement among the conspirators to commit an unlawful act. *United States* v.

Falcone, 311 U. S. 205, 210; *Morrison* v. *California*, 291 U. S. 82, 92. This, as well as the other elements, may be established by circumstantial evidence. *Reavis* v. *United States*, 106 F. (2d) 982; *Kassin* v. *United States*, 87 F. (2d) 183, 184. But in relying on circumstantial evidence to prove Glasser guilty of conspiracy, circumstances must be established upon which to found a legitimate inference of the existence of the unlawful agreement and participation therein by him with knowledge of the agreement. In short, the circumstantial evidence must warrant the jury in finding he had some unity of purpose, some common design and undertaking, some meeting of minds with the others in the alleged unlawful arrangement. Furthermore, the circumstances relied upon as a basis for such inference by the jury must not only be consistent with the guilt of Glasser but must be inconsistent with any hypothesis of innocence on his part. *Shannabarger* v. *United States*, 99 F. (2d) 957, 961; *Langer* v. *United States*, 76 F. (2d) 817, 826, 827. And, of course, unless the Government by independent evidence, circumstantial or otherwise, established the existence of the conspiracy and that petitioner was a party to it, the acts or statements of alleged co-conspirators outside the presence of Glasser could not properly be received in evidence. *United States* v. *Renda*, 56 F. (2d) 601, 602 (C. C. A. 2); *Minner* v. *United States*, 57 F. (2d) 506, 511 (C. C. A. 10); *Nibbelink* v. *United States*, 66 F. (2d) 178, 179 (C. C. A. 6); *Mayola* v. *United States*, 71 F. (2d) 65, 67 (C. C. A. 9); *Minker* v. *United States*, 85 F. (2d) 425, 427 (C. C. A. 3).

The salutary effect of these principles has peculiar application here in view of the fact that, as is known to all men in public life, purported ability of others to influence actions of public officers through payment of money or otherwise is, without the knowledge of such public officers, frequently made the occasion for receipt of money by such persons from third parties interested in influencing the

official acts of such public officers. It is here that the case fails as against Glasser. Obviously, mere concurrence of (1) payment of money by third persons to alleged co-conspirators accompanied by their hints, innuendoes, or statements as to corruption of Glasser, plus (2) a cessation of prosecutive action by Glasser, gives rise to no legitimate inference that Glasser was a party to the conspiracy. *United States* v. *Falcone*, 311 U. S. 205, 210-211; *Weniger* v. *United States*, 47 F. (2d) 692.

As was said in *United States* v. *Falcone*, 109 F. (2d) 579, 581 (C. C. A. 2) aff'd 311 U. S. 205:

> There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that for which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all-comprehensive indictments that they can be avoided.

The nature of the evidence offered here makes it clear that the initial establishment of participation by Glasser, with knowledge of the conspiracy, must be made to appear from the facts of one of the particular prosecutions, the cessation of which by him is charged to have been the object of the conspiracy. In other words, it will not do merely

to show payment of monies to third persons with regard to one prosecution, together with cessation of prosecution in some wholly different case. Therefore, testing the sufficiency of the evidence to establish a case of guilt on Glasser's part, it is necessary to consider separately the facts put in evidence in each individual prosecution and the facts that they may properly be inferred to show. Two examples will suffice.

1. *Prosecution of Peter Hodorowicz and Clem Dowiat for operation of the 118th Street still.*—The broad general statement of the Government includes the following citations relating to this prosecution (Br. in Opp., pp. 7-9):

> Kretske and Horton solicited money for the fixing of many cases and in most instances received it (R. * * * 297, * * *).
>
> * * * * * * *
>
> Upon the receipt of payments prosecutive action would generally cease (R. * * * 261, * * * 270, 271, 276, * * *), * * * the accused would be discharged (R. * * * 297, * * *). * * * and Glasser was known during the negotiation of these transactions to be the person whose conduct was to be influenced (R. * * * 297 * * *).
>
> There was evidence from which the jury could find that the disposition of these cases was the direct result of some act or failure to act on the part of Glasser (R. * * * 297, * * *).

Examination of these citations, in so far as they relate to this case, will show the following, and nothing more: Peter Hodorowicz and Clem Dowiat were arrested September 1, 1937, for operation of a still at 118th Street (R. 259-261, 270, 276). There was evidence that Frank Hodorowicz paid "$800 to Kretske." The same evening, September 23, 1937, Kretske purported to deliver the money to "Red"

and told Hodorowicz: "Everything is taken care of for tomorrow morning" (R. 295-297). The following morning, September 24, 1937, Commissioner Walker sustained a motion to suppress the evidence (R. 285-286) and they were discharged (R. 261, 271, 297). This evidence the Government would apparently deem damning. It is typical of the facts upon which the Government relies to establish the fact of the unlawful agreement by Glasser.

However, the reason why no court could fairly permit a jury to draw such an inference from such circumstantial evidence is made clear from the following additional facts which happened to be brought out in this particular case: First, Glasser had argued the case to the Commissioner on September 23, prior to the evening of September 23 when the money payment was alleged to have been made (R. 278, 285); second, the Government's witness, Agent Rossner, testified that he gave all evidence he had in his possession (R. 279); third, this same agent's testimony showed that the search warrant, obtained by the original investigating agent and upon the basis of which the search and arrest were made, specified an incorrect address (R. 279, 277, 278). The cessation of prosecution was, therefore, definitely attributable to error of an agent and not to Glasser.

2. *Prosecution of Walter Kwiatowski.*—The same broad general statements of the Government in its brief in opposition rely in part for support on citations to the Kwiatowski case (pp. 7-9):

> Kretske and Horton solicited money for the fixing of many cases and in most instances received it (R. * * * 413 * * *).
>
> * * * * * * *
>
> Upon the receipt of payments * * * the accused would be discharged (R. 289, * * * 414).
>
> * * * * * * *

> There was evidence from which the jury could find that the disposition of these cases was the direct result of some act or failure to act on the part of Glasser (R. 289, • • • 413-414 • • •).
>
> The record discloses many instances of Glasser's failure to utilize available information and evidence in securing indictments and in otherwise prosecuting cases (Ex. 74, R. 406-408; Ex. 120, R. 585-587 • • •).

Examination of these citations shows merely: That Walter Kwiatowski sometime between August 25 and September 14, 1938, paid $600 to defendant Horton for the purported "fixing" of his case (R. 413). Glasser represented the Government (R. 289). On September 14, 1938, Kwiatowski was discharged by the Commissioner (R. 414).

But the record shows that on cross-examination, Kwiatowski denied that he had paid any money to Horton (R. 415). The arresting agent testified that at the hearing before the Commissioner he told the whole truth and withheld no evidence (R. 398); and that he told the Commissioner he had arrested Kwiatowski when he came from the premises for which he had a search warrant, whereupon the Commissioner stated that he had no right to arrest Kwiatowski (R. 397). The substance of Exhibit 74 (R. 406-408), a letter by the investigator in charge to which the Government refers above, was given by the agent in his testimony before the Commissioner (R. 405). It thus appears that in the proceeding before the Commissioner the reason for the discharge of the prisoner was obvious—lack of evidence. As to the subsequent supplemental investigation and its results shown by the so-called letter and report, dated November 10, 1938, Exhibit 120, R. 585-587, there was no showing that any agent conferred personally with Glasser about it as was the usual practice (R. 963). Neither was there any showing that the Alcohol Tax Unit or anyone else subsequently urged or requested Glasser to make presentation of the case to a grand jury.

As a matter of fact, since Glasser's connection with the office terminated soon afterward, in April, 1939 (R. 912), and since there is nothing to show that in the ordinary course of business this matter would, before that date, have been reached for consideration as to presentation to a grand jury, this item falls far short of justifying an inference that Glasser failed properly to utilize the supplementary report.

If such testimony as this be regarded by the Department of Justice as evidence that the disposition of the case was the result of a criminal conspiracy on the part of Glasser, all prosecuting officers are in effect subject to a particularly vicious form of attaint. The citations made by the Government to sustain the conviction are not merely inconclusive but misleading when measured by established principles of law relating to circumstantial evidence. A *prima facie* showing of guilt in this case may be shown, if at all, by reference to the facts of a single prosecution. If it can, let the Government select any one or more prosecutions handled by the petitioner which it may choose, together with a careful statement of the circumstantial facts adduced and all facts which it deems such facts to prove. If upon such a statement, it appears that the ultimate fact of Glasser's guilt of conspiracy may be inferred from such circumstantial facts in evidence, then petitioner will confess the point.

The error of the Circuit Court of Appeals upon the merits has been set forth in parallel columns in the petition for certiorari herein (pp. 33-46). The Government has, so far, replied with nothing but vague assertions which are unsupported by the record. Petitioner denies that there is any evidence connecting him with the so-called conspiracy or any unlawful scheme. If the Government thinks otherwise, let it come forward with specific facts sustainable upon the record and sufficient in law.

CONCLUSION

The petitioner, during the period of his service in the office of the United States Attorney for the Northern District of Illinois, had an outstanding record (see *supra*, p. 5, note 4.) In an office of 18 assistants, he handled at least 25 per cent of the work. United States Attorney Igoe, his superior, now District Judge Igoe, testified that at the times complained of in this alleged indictment, he either ordered or approved of all official steps taken by Glasser; and he also gave an unequivocal statement as to the good character and reputation of petitioner (R. 895, 904). Judge Barnes, for nine years a Federal judge, presumably well qualified to weigh the abilities and performance of a prosecuting attorney, testified that the petitioner was an excellent one, possibly too good—too good for the criminals (R. 720).

The paucity of evidence in this case against Glasser tends strongly to confirm the view that it was initiated out of private enmity. The numerous acts of the prosecutor and judge, which in no view could be deemed consonant with the conduct of a fair trial, further induces the conclusion that Glasser was tried with a malicious zeal which had no regard for the high responsibility and trust reposed in the prosecuting attorneys and trial judges.

For his devotion to duty and observance of his obligation to see justice done, petitioner has been subjected to the ignominy of indictment, trial, and conviction—and the consequent impairment of his ability to earn a livelihood for over two years. It is submitted that this case requires reversal not only in justice to the petitioner but as a safeguard and assurance to all public officers against the peril that their acts, no matter how innocent, may later be made the ground of prosecution.

HOMER CUMMINGS,
WILLIAM D. DONNELLY,
Counsel for Petitioner.

October, 1941.

APPENDIX

U. S. C., Title 18, sec. 88 (Criminal Code, sec. 37):

Conspiring to commit offense against United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

U. S. C., Title 18, sec. 91 (Criminal Code, sec. 39):

Bribery of United States officer. Whoever shall promise, offer, or give, or cause or procure to be promised, offered, or given, any money or other thing of value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made, or tendered, and imprisoned not more than three years.

U. S. C., Title 28, sec. 411 (Judicial Code, sec. 275):

Jurors; qualifications and exemptions. Jurors to serve in the courts of the United States, in each State respec-

tively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned.

U. S. C., Title 28, sec. 412 (Judicial Code, sec. 276):

Same; manner of drawing. All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court, or a duly qualified deputy clerk, and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk, or a duly qualified deputy clerk then acting, may belong, the clerk, or a duly qualified deputy clerk, and said commissioner each to place one name in said box alternately, without reference to party affiliations until the whole number required shall be placed therein.

Illinois Rev. Stats. (1939), c. 78, sec. 1:

The county board of each county shall, at or before the time of its meeting, in September, in each year, or at any time thereafter, when necessary for the purpose of this Act, make a list of sufficient number, not less than one-tenth of the legal voters of each sex of each town or precinct of the county, giving the place of residence of each name on the list, to be known as the jury list.